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THE OBAMA BRIEF

The President considers his judicial legacy.

By Jeffrey Toobin

In July, a three-judge panel of the United States Court of Appeals for the D.C. Circuit issued a ruling that threatened the future of President Obama's Affordable Care Act. By a vote of two to one, the court held, in Halbig v. Burwell, that the insurance subsidies that allow millions of Americans to buy health insurance were contrary to the text of the law and thus were illegal. If such a decision had been made earlier in Obama's tenure, lawyers for his Administration would have been left with a single, risky option: an appeal to the politically polarized, and usually conservative, Supreme Court.

This year, the lawyers had another choice. When President Obama took office, the full D.C. Circuit had six judges appointed by Republican Presidents, three named by Democrats, and two vacancies. By the time of the Halbig decision, Obama had placed four judges on the D.C. court, which shifted its composition to seven Democratic appointees and four Republicans. In light of this realignment, the Obama Administration asked the full D.C. Circuit to vacate the panel's decision and rehear the Halbig case en banc—that is, with all the court's active judges participating. The full court promptly agreed with the request, and the decision that would have crippled Obamacare is no longer on the books. Oral argument before the full court is now set for December.

The transformation of the D.C. Circuit has been replicated in federal courts around the country. Obama has had two hundred and eighty judges confirmed, which represents about a third of the federal judiciary. Two of his choices, Sonia Sotomayor and Elena Kagan, were nominated to the Supreme Court; fifty-three were named to the circuit courts of appeals, two hundred and twenty-three to the district courts, and two to the

constitute a majority in nine circuits. Because federal judges have life tenure, nearly all of Obama's judges will continue serving well after he leaves office.

Obama's judicial nominees look different from their predecessors. In an interview in the Oval Office, the President told me, "I think there are some particular groups that historically have been underrepresented—like Latinos and Asian-Americans—that represent a larger and larger portion of the population. And so for them to be able to see folks in robes that look like them is going to be important. When I came into office, I think there was one openly gay judge who had been appointed. We've appointed ten."

The statistics affirm Obama's boast. Sheldon Goldman, a professor at the University of Massachusetts at Amherst and a scholar of judicial appointments, said, "The majority of Obama's appointments are women and nonwhite males." Forty-two per cent of his judgeships have gone to women. Twenty-two per cent of George W. Bush's judges and twenty-nine per cent of Bill Clinton's were women. Thirty-six per cent of President Obama's judges have been minorities, compared with eighteen per cent for Bush and twenty-four per cent for Clinton. Obama said that the new makeup of the federal bench "speaks to the larger shifts in our society, where what's always been this great American strength—this stew that we are—is part and parcel of every institution, both in the public sector as well as in the private sector."

Beyond diversity, the story of Obama's influence on the courts is more complex. Indeed, it could serve as a metaphor for his Presidency: symbolically rich but substantively hazy. Obama took office after years of intense conservative focus on the courts. President George W. Bush spoke often of the need for judges who "will strictly apply the Constitution and laws, not legislate from the bench." The conservative agenda included limiting abortion rights, ending racial preferences, and lowering barriers between church and state. Obama has shrunk from an ideological battle with conservatives on these constitutional issues. Claims for his judges are grounded in their personal integrity and professional competence. Notwithstanding their qualifications, many of his appointees have drawn fierce opposition from Senate Republicans. In those battles, too, where his judicial legacy has been at stake, the President has chosen to remain largely above the fray.

Obama served as president of the *Harvard Law Review* (Class of 1991), and taught at the University of Chicago law school for more than a decade. He was never exactly a legal academic; he didn't write law-review articles or seek a tenure-track job. He taught classes once a week while practicing law and, later, while serving in the Illinois state senate, in Springfield. When it comes to the law, Obama may never have been a full professor, but he remains fully professorial.

I asked him to name the best Supreme Court decision of his tenure. When the Court upheld the constitutionality of the Affordable Care Act, in 2012? When it struck down the Defense of Marriage Act, a year later? Neither, it turned out.

"In some ways, the decision that was just handed down to not do anything about what states are doing on same-sex marriage may end up being as consequential—from my perspective, a positive sense—as anything that's been done," the President said.

changes that have taken place in society and that the law is having to catch up." In the Loving decision, from 1967, the Court held that states could no longer ban racial intermarriage.

In other words, Obama's favorite decision was one in which the Court allowed the political process to go forward, one state at a time. Not long ago, the President described his foreign-policy doctrine as one that "avoids errors. You hit singles, you hit doubles." On same-sex marriage, the Supreme Court had hit a single, or maybe a double, and that was fine with him.

Obama opposed marriage equality until May of 2012. He told me that he now believes the Constitution requires all states to allow same-sex marriage, an argument that his Administration has not yet made before the Supreme Court. "Ultimately, I think the Equal Protection Clause does guarantee same-sex marriage in all fifty states," he said. "But, as you know, courts have always been strategic. There have been times where the stars were aligned and the Court, like a thunderbolt, issues a ruling like Brown v. Board of Education, but that's pretty rare. And, given the direction of society, for the Court to have allowed the process to play out the way it has may make the shift less controversial and more lasting."

"The bulk of my nominees, twenty years ago or even ten years ago, would have been considered very much centrists, well within the mainstream of American jurisprudence, not particularly fire-breathing or ideologically driven," Obama said. "So the fact that now Democratic appointees and Republican appointees tend to vote differently on issues really has more to do with the shift in the Republican Party and in the nature of Republican-appointed jurists. . . . Democrats haven't moved from where they were."

This is how Obama has attempted to define his Presidency—as an exemplar of common sense set against the extremism of the contemporary Republican Party. He has had the same mixed success in making this argument for his judges as he has had on most other issues during the past six years.

Ruth Bader Ginsburg, in a recent interview published in *Elle*, said that she would

I asked Obama if Ginsburg was right about his political weakness. "Well, we've got a pretty good track record," he said. "We've got a couple of Supreme Court Justices confirmed who I think are doing outstanding work. My sense is that the Senate necessarily has to treat the Supreme Court nomination process differently than the circuit- or district-court nomination process—higher profile, people are paying attention." He found that most people pay little attention to lower-court appointments, but when it comes to the Supreme Court "they have the sense 'All right, this is big,' " and the media cover the story intensely, "which means that some of the shenanigans that were taking place in terms of blocking appointments, stalling appointments, I think are more difficult to pull off during a Supreme Court nomination process.

"Having said that, Justice Ginsburg is doing a wonderful job. She is one of my favorite people. Life tenure means she gets to decide, not anybody else, when she chooses to go." Asked whether he had any advice about her retirement, Obama replied, with a big smile, "None whatsoever."

Still, what the President calls "shenanigans" have defined his effort to move his circuit-court and district-court nominations through the Senate. For a politician who is still fairly new on the political scene, Obama has had considerable experience with judicial nominations and confirmations—a subject of great controversy in the past decade. As a senator and as President, Obama has recoiled from the particulars of these fights, leaving others to do the dirty work.

Charles Grassley, the veteran Republican senator from Iowa, dates the conflict between Democrats and Republicans in the Senate over judges to 1987. "It all starts with Bork," Grassley told me. After contentious Senate Judiciary Committee hearings chaired by Joseph Biden, Ronald Reagan's nomination of Robert Bork to the Supreme Court was voted down, fifty-eight to forty-two. Four years later, Clarence Thomas's nomination produced an even more rancorous struggle. Ginsburg was confirmed easily, in 1993, as was Stephen Breyer, in 1994.

The tumultuous end to the 2000 election led to a renewed period of partisan struggle in the Senate over the confirmation of judges, which has never really ended. "Right

no question that the Democrats were always the aggressors on judicial nominations." In particular, Senate Democrats rallied against the nomination of Miguel Estrada, a widely admired Republican lawyer, to the D.C. Circuit. Repeated filibusters forced him to withdraw, in 2003. More than a decade later, his defeat still irks Senate Republicans. "Estrada is the poster child for how the Democrats destroyed the process," Sessions told me.

Most of George W. Bush's judicial nominations were easily confirmed, but, in 2005, many Democratic senators decided to make a stand. They objected to several of his circuit-court nominees, and refused to allow votes to take place. The D.C. Circuit—often described as the second most important court in the nation—was the focus of the dispute. Democrats fought the nominations of Janice Rogers Brown, a justice of the California Supreme Court, who had once called Social Security and other New Deal programs "the triumph of our own socialist revolution," and Brett Kavanaugh, a Bush White House aide who had made his name as a principal author of the Starr report.

There were only forty-five Democrats in the Senate, but that was enough to prevent the nominations from coming to the floor for a vote. Under the Senate rules, it took sixty votes to end a filibuster. In response to the Democratic tactics, Bill Frist, the Majority Leader at the time, threatened to invoke what became known as "the nuclear option," which would have changed the Senate rules to allow nominations to proceed with a simple majority.

Obama had just been elected to the Senate, and, as he later suggested in his book "The Audacity of Hope," he viewed the battle with disdain. "I remember muffling a laugh the first time I heard the term 'nuclear option,' " he wrote. "It seemed to perfectly capture the loss of perspective that had come to characterize judicial confirmations." In Obama's account, he supported the efforts of Democratic colleagues, but with reservations. "I doubted that our use of the filibuster would dispel the image of Democrats always being on the defensive—a perception that we used the courts and lawyers and procedural tricks to avoid having to win over popular opinion," he wrote. "I wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy."

Democrats agreed not to filibuster judicial nominees unless there were "extraordinary circumstances." The agreement led to the confirmation of almost all of Bush's nominees, including Brown and Kavanaugh.

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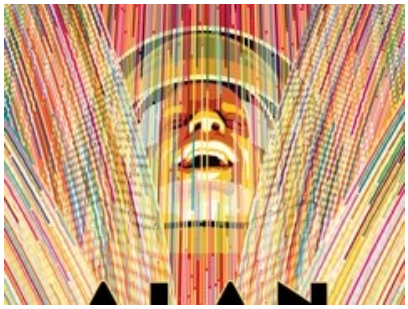

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That, more or less, was how things stood when Obama became President. Sixty votes were still required to end debate on judicial nominees, but the minority party in the Senate—now the Republicans—was supposed to acquiesce to votes unless the judicial candidate presented "extraordinary circumstances."

Harry Reid and Barack Obama belong to the same political party but to different worlds. At seventy-four, the Senate Majority Leader is a generation older than the President, and his rough-hewn upbringing, in Searchlight, Nevada, makes him more comfortable with close political combat than with polished phrasemaking. When Reid was a law student, at George Washington University, in the nineteen-sixties, he didn't spend his spare time on scholarly publications; he moonlighted as a Capitol police officer.

When I visited Reid in his small, elegant office, just off the Senate floor, he spoke wistfully about the first two years of Obama's Presidency, when Democrats controlled the House of Representatives and enjoyed a filibuster-proof majority in the Senate. "This first Congress, we were very successful. We were successful during the regular Congress, we were really successful in the lame duck," he told me. But in 2010 the Democrats lost the House and several seats in the Senate, and, as a result, Reid told me, "the last two Congresses have been awful."

With the House in Republican hands, the chances of passing meaningful legislation diminished to nearly zero, and that, in a peculiar way, put more focus on the issue of judicial nominations. Reid could confirm judges without the assent of the House, so he tried to push through as many nominations as he could. In his view, Republicans have violated the pledge made in the Gang of 14 pact of 2005. Instead of filibustering only in "extraordinary circumstances," Republicans routinely insisted on sixty-vote majorities to end debate on lower-court judicial nominees. "I regret having been one of the premier movers of that deal we made, stopping the nuclear option," Reid said. "I wanted to make peace here, I wanted the place to work better. Once they got those people on there—Janice Rogers Brown, a guy named Kavanaugh—they were virtually bringing everything to a standstill."

Who filibustered more—the Democrats under Bush, or the Republicans under Obama—is disputable. Republicans have used filibusters to stop outright only two of Obama's judicial nominations: Caitlin Halligan, a former aide to Andrew Cuomo, nominated to the D.C. Circuit; and Goodwin Liu, a Berkeley law professor, nominated to the Ninth Circuit. (Governor Jerry Brown later appointed Liu to the California Supreme Court.) But delays by Republican senators have slowed the confirmation process. "In the scheme of things, the long-term trend here, at least since the mid-eighties, is declining confirmation rates and rising length of time it takes to get nominees on the bench," Sarah Binder, a congressional scholar at the Brookings Institution, told me.

The Senate's inability to accomplish anything, including the confirmation of judges, began generating disquiet within Reid's Democratic caucus. Jeff Merkley, of Oregon, and Tom Udall, of New Mexico, began pressing him to invoke his own nuclear option:

An older group of senators, including Reid, initially opposed such a major change in the Senate's rules.

The turning point came last November, when Reid brought to the Senate floor three Obama nominees to the D.C. Circuit: Patricia Millett, Nina Pillard, and Robert Wilkins. (A fourth Obama nominee, Sri Srinivasan, had been confirmed earlier in the year.) As the debate began, it became clear that few Republicans had any substantive objections to any of the nominees. Rather, they argued that the D.C. Circuit heard so few cases that there was no need to fill the vacant judgeships. "The D.C. Circuit is a thorn in my saddle," John Cornyn, of Texas, told me. He said that Democrats simply wanted to gain a majority for cases when the judges sat en banc.

Reid confronted a dilemma, much as Frist had done in 2005. Like all his Democratic colleagues, Reid scoffed at the Republicans' rationale for denying the votes. The Republicans had tried to fill those same seats on the D.C. Circuit when Bush was President. It hardly counts as court-packing to fill existing judicial vacancies. But Reid had only fifty-three votes. "I'm a traditionalist here," Reid told me. "I didn't want to stir up a lot of trouble." Then, last November, Reid said, his deputy leader, Richard Durbin, of Illinois, remarked that their Republican colleagues were mocking them. "And I knew that was true," Reid went on. "He said, 'They're just saying to each other, "Hey, he wants to change the rules, let him do it."' Because they didn't think we had the votes."

Republican intransigence about the D.C. Circuit nominees finally brought around even the most senior Democrats to the idea of filibuster reform. "I was probably the last person to agree to it," Patrick Leahy, of Vermont, the president pro tempore of the Senate, and its longest-serving member, told me. "I believe the Senate should be independent, not a rubber stamp of any Administration. But this was a wholesale filibuster, completely unprecedented in two hundred years." On November 21, 2013, the Senate voted, along party lines, to change its rules so that only fifty-one votes were necessary to bring up for a vote a circuit-court or district-court nomination.

Since then, the Senate votes have cemented Obama's judicial legacy. With simple majorities, the Senate approved the three D.C. Circuit nominees, who joined a court

in that they are all relatively youthful and impeccably credentialled, with indistinct ideological profiles: David Barron, a forty-seven-year-old Harvard Law School professor, and a former law clerk to John Paul Stevens, to the First Circuit; Pamela Harris, a fifty-two-year-old Georgetown law professor and another former Stevens clerk, to the Fourth Circuit; and Michelle Friedland, a San Francisco attorney active in the legal fight for gay rights (and a former clerk to Sandra Day O'Connor), who is forty-two, to the Ninth Circuit. According to statistics compiled by Sheldon Goldman, of the University of Massachusetts, the average age of Obama's first-term appeals-court nominees was 53.5 years, and 49.4 for his second-term nominees. This predilection for younger nominees was a strategy of Robert Bauer, Obama's White House counsel, and his successor, Kathryn Ruemmler. The judges are likely to serve for decades, and they constitute a farm team for prospective Supreme Court appointments.

I asked Senator Reid what role the President played in overcoming the confirmation impasse. "I think he's been good in the sense that he's sent some good people," he replied. In the light of the magnitude of the struggle, Reid's praise for the President was faint. To Reid, Obama had the easy job of supplying the names. The Democratic Senate did the hard work of turning those nominees into judges.

Obama has stopped pretending that he has much respect for Congress. He had minimal tolerance for legislative horse-trading even when he was a legislator. Now, after six years of implacable Republican opposition to everything he has proposed, he sounds fed up.

"Because Congress is not working the way it's supposed to, there's both pressure on administrative agencies and pressure on the courts to sort through, interpret, and validate or not validate decisions that in a better-functioning democracy would be clearer and less ambiguous," Obama said.

He pointed out that the failure of Congress to pass legislation on climate change and immigration left his Administration with little guidance on how to proceed on those issues. When there is gridlock in Congress, "the executive branch has to make a whole series of decisions," Obama said. "That, in turn, puts more burden on the Court to

Obama could have added to his list of congressional abdications the Halbig case, the challenge to Obamacare now pending in the D.C. Circuit. The lawsuit is based on what amounts to a typographical error. One provision of the Affordable Care Act states that individuals can receive subsidies for insurance purchased on health-care exchanges "established by the State." Sixteen states and the District of Columbia set up their own health-care exchanges; residents of the thirty-four other states must buy their subsidized insurance on exchanges run by the federal government. Throughout the debate over the legislation, and in other parts of the law, it was a given that the subsidies applied to both the state and the federal exchanges. But two Republican-appointed judges on the D.C. Circuit held that the language of the provision meant that subsidies must be withdrawn for the approximately 4.7 million individuals who purchased insurance on the federal exchange. (A Democratic appointee voted to uphold the law.) In a democracy that wasn't deadlocked, an amendment to the legislation might have provided clarification. Instead, a single phrase in the law has been used as a way to continue the legal war against Obamacare by new means. The confirmation of Obama's D.C. Circuit appointees increases the law's prospects for surviving, but the judges' decision could be appealed to the Supreme Court, where Obama's agenda faces significant challenges.

The subject of voting rights has largely been thrust upon Obama by a conservative judiciary. "You look at something like the Voting Rights Act, which was uncontroversial from a legal point of view among both Republicans and Democrats ten, fifteen, twenty years ago," Obama told me. "The ruling that struck down key provisions of the Voting Rights Act would have been considered a fairly radical step, but it's a step that the Supreme Court took." He was referring to the Shelby County decision, of 2013, which invalidated the portion of the law that required Justice Department review of electoral changes, mostly in Southern states.

In response, Obama offered a modulated criticism. As he put it, "The fact that the Supreme Court didn't seem to internalize evidence where state election officials or politicians are pretty unabashed in saying we want to keep certain folks from voting, where you have voter-I.D. laws that clearly make it harder for certain folks to vote,

advantage. The fact that that doesn't seem to have gone into the Court's reasoning I think makes it an ultimately flawed decision."

For a long time, the Court has moved toward outlawing all forms of racial preference, including affirmative action, and Obama seems accepting, even supportive, of the change. In 1978, in Regents of University of California v. Bakke, the Court rejected the use of racial quotas in graduate-school admissions. Chief Justice Roberts has made the fight against the traditional civil-rights agenda a cornerstone of his tenure. He wrote nearly a decade ago, "It is a sordid business, this divvying us up by race."

Specifically, Obama told me that he believes the Constitution permits the use of racial preferences, though only within carefully defined limits. "It's legitimate to say that when the government takes race into account it should be subject to some oversight by the courts," he said. Judicial "oversight" of affirmative action has a controversial history. For many decades, starting in the nineteen-thirties, the Court applied "strict scrutiny" to laws that discriminate against racial minorities, and struck down most of them.

Starting in 1995, though, with Adarand Constructors v. Pena, the Court, in an opinion by Sandra Day O'Connor, began applying "strict scrutiny" to laws that favor racial minorities—viewing affirmative action, in effect, as a form of racial discrimination. O'Connor's opinion drew a stinging dissent from John Paul Stevens. "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination," he wrote. "Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society." In its embrace of judicial oversight of affirmative action, Obama's view appears closer to O'Connor's than to Stevens's.

By 2003, O'Connor had softened her stance somewhat, writing the majority opinion in Grutter v. Bollinger, which upheld the use of affirmative action as a means to achieve diversity at the University of Michigan Law School. However, she made clear that she regarded affirmative action as a stopgap. In twenty-five years, she wrote, racial

that folks with different experiences in a classroom will enhance the educational experience of the students, and they do it in a careful way," the practice should be allowed. Still, he added, "most of the time the law's principal job should be as a shield against discrimination, as opposed to a sword to advance a social agenda, because the law is a blunt instrument in these situations."

Obama reiterated his belief that the biggest issues concerning race are "rooted in economics and the legacy of slavery," which have created "vastly different opportunities for African-Americans and whites." He went on, "I understand, certainly sitting in this office, that probably the single most important thing I could do for poor black kids is to make sure that they're getting a good K-through-12 education. And, if they're coming out of high school well prepared, then they'll be able to compete for university slots and jobs. And that has more to do with budgets and early-childhood education and stuff that needs to be legislated."

I asked the President whether O'Connor's time line in the Grutter case, now about halfway expired, was accurate. He replied that Justice O'Connor would "be the first one to acknowledge that twenty-five years was sort of a ballpark figure in her mind." In any event, he said, progress in racial justice and equality would not come principally from the courts. "And that's where politics comes in," he said.

The previous three Presidents who served two terms—George W. Bush, Bill Clinton, and Ronald Reagan—spent their last two years in office with the Senate under the control of the opposition party. Polls suggest that Obama and the Democrats may meet the same fate. The "Thurmond rule," which emerged when Senator Strom Thurmond, of South Carolina, blocked Lyndon Johnson's attempt to appoint a new Chief Justice near the end of his Presidency, holds that the Senate stops acting on lifetime judicial nominations roughly six months before a Presidential election. Still, Obama's judicial legacy is not complete. According to statistics compiled by the Alliance for Justice, a liberal advocacy group, Bush, Clinton, and Reagan all saw about twenty per cent of their total judicial appointments confirmed during their final two years in office. If the pattern holds, that would mean the confirmation of about seventy more Obama judges.

he entertained thoughts of serving as a judge later in his career. "When I got out of law school, I chose not to clerk," he said. "Partly because I was an older student, but partly because I don't think I have the temperament to sit in a chamber and write opinions." But he sounded tempted by the idea.

"I love the law, intellectually," Obama went on. "I love nutting out these problems, wrestling with these arguments. I love teaching. I miss the classroom and engaging with students. But I think being a Justice is a little bit too monastic for me. Particularly after having spent six years and what will be eight years in this bubble, I think I need to get outside a little bit more." ♦

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