

The difficulties over Michael Boggs' confirmation in the Senate have been made worse by the Democrats' filibuster reform.

*Last year Senate Majority Leader, Harry Reid, forced the removal of the filibuster for judicial nominations except to the Supreme Court. This move may now be a headache for Reid and the Democratic Party, as the Senate considers President Obama's nomination of Michael Boggs for the Georgia judiciary. **Lauren C. Bell** writes that Boggs' nomination, vehemently opposed by many Democrats, due to his voting record as a state legislator, is part of an agreement with the GOP to allow a vote on an appeals court nominee opposed by Republicans. She writes that despite many Democrats' opposition to Boggs, the new filibuster rules mean that his confirmation may only require the votes of a small number of their colleagues who want to see their own nominees pushed through.*



President Barack Obama's [nomination of Michael Boggs](#) to a vacant seat on the U.S. District Court for the Northern District of Georgia has drawn scathing criticism from various quarters in the last week. The objections are not to his legal credentials—Boggs received a [majority “well-qualified” rating](#) from the American Bar Association—but to his political history. A Republican appointee to the Georgia Court of Appeals, who originally sought appointment on the basis of his credentials as a [“strict constructionist,”](#) Boggs' nomination has met with substantial opposition from civil rights leaders and prominent Democrats.

The critique of Boggs' nomination is two-fold. First, Boggs' critics find his voting record as a Georgia state legislator unacceptable. Most troubling to Senate Democrats and liberal advocacy groups are the votes Boggs cast as a state legislator in Georgia to permit the confederate insignia to remain a part of the state flag, to restrict marriage to heterosexual couples, and to impose limits on abortion access.

A second set of complaints has been leveled against the White House, with President Obama coming under fire for nominating Boggs. Representative David Scott (D-GA) has led much of this criticism, using traditional and social media to lambast both Boggs' record and the President for nominating him. The Boggs nomination is “a disgrace of the highest degree,” stated Scott in a [February 2014 radio interview](#). “What your audience needs to understand is the level of disrespect that this president has done to this nation on these appointments.” Scott's colleague in the Georgia delegation, civil rights leader and member of Congress John Lewis, (D-GA) has also come out against Boggs' nomination. These members accuse Boggs of being anti-civil rights, and are furious with the President for nominating him.

It is unclear to what extent the White House actually supports Boggs. His nomination was part of a package of nominations agreed to by the White House in September 2013. According to [media accounts](#) and [members of Congress](#), the White House agreed to permit Georgia's Republican senators, Saxby Chambliss and Johnny Isakson, to select the nominees for three of four vacancies on the U.S. District Court for the Northern District of Georgia in exchange for these senators dropping their opposition to two appeals court nominees. The White House has not indicated a willingness to push for Boggs' confirmation, and has repeatedly emphasized that Boggs was the choice of Georgia's Republican senators. Spokespersons for the White House have reiterated that his nomination was necessary in order to fill long-term judicial vacancies and advance other nominations that are important to the President.

Such deals are not unusual. Article II of the Constitution requires the President to appoint federal judges “by and with the advice and consent of the Senate.” Although the Constitution did not prescribe any particular method for seeking the Senate's advice, the practice of “senatorial courtesy” – deference by the President to senators from the state in which a vacancy occurs – developed during President Washington's first term in office. Today, senatorial courtesy is exercised through the Senate's blue slip procedure, which allows home state senators to

signal their support for, or opposition to, a nomination by communicating with the Senate Judiciary Committee chairman. Although different Committee chairmen have had different approaches to the blue slip procedure, the Committee [currently requires two expressions of support from home state senators](#) in order to move a nomination forward. In states with one or more Republican senators, this gives the Republicans an important role in the confirmation process, despite Democratic control of both the White House and the Senate.

Senate practice throughout history has generally been to prevent the confirmation of any individual that is opposed by the senators that represent the state in which they are nominated to serve. This means that presidents frequently make deals with senators, which often include promises to permit senators to select future nominees, in exchange for their support of a president's choice for another position.

In many such cases, the White House will agree to make the nomination but will not push for confirmation. The Senate's confirmation process has a number of potential rejection points, and nominees who are selected as part of a deal between the White House and Congress often fail to be confirmed.

The first hurdle for Boggs will be approval by the Senate Judiciary Committee. No Democrat on the Committee has come out publicly in support of Boggs' nomination. Assuming that all eight Republican committee members support Boggs, at least two of the 10 Democrats on the Committee would need to join them in order for the nomination to move forward. (Nominations, with the exception of those to the U.S. Supreme Court, fail on tie votes.)

If Boggs' nomination makes it out of committee, his nomination will next have to be scheduled for a vote by the full Senate. Majority Leader Harry Reid is under no obligation to hold a vote on Boggs, but he will be in a difficult position. Senatorial courtesy not only requires presidential deference to home state senators, but typically also requires intra-chamber deference to these senators as well. Senators rarely oppose their colleagues' picks to serve on the U.S. District Courts because they do not later want their colleagues to block their own choices.

If Mr. Reid fails to schedule a vote, Senators Chambliss and Isakson have a myriad of parliamentary maneuvers available to them to hold up other important matters of pending business in retaliation. These could include a series of filibusters or holds (threatened filibusters) on other nominees or pending legislation. A substantial enough effort might force Majority Leader Reid to call up the nomination.

But if Mr. Reid schedules a vote, he risks Boggs being confirmed despite the vociferous objections of important Democratic constituencies and, perhaps, even the objections of a majority of his own party caucus. That is because it now takes only 51 senators to invoke cloture on judicial nominations—the result of Reid's decision last November to use the so-called “nuclear option” to [eliminate filibusters on most judicial nominations](#). Republicans currently control 45 votes in the Senate; it is unclear how many Democrats would support Boggs, but in the post-nuclear Senate it would take only a handful of Democratic votes to permit Boggs to be confirmed. With more than two-dozen District Court nominations pending in the Senate, most of whom are supported by home-state senators, there may be incentives for some Democrats to support Boggs' nomination rather than risk retaliation when their



Senate Majority Leader Harry Reid Credit: Ralph Alswang, Center for American Progress Action Fund (Creative Commons BY SA)

nominees are up for a vote.

Based on the Senate Judiciary Committee's May 13 hearing on Boggs' nomination, it is entirely possible that Boggs will fail to be approved by the panel, making any concern about floor action on the nomination moot. But Boggs' prospects for success ultimately, and ironically, may be affected by last year's changes to the Senate's filibuster rules, forced through by Majority Leader Reid with the encouragement and backing of a wide range of liberal interest groups. At that time, Minority Leader Mitch McConnell warned: "You'll regret this and you might regret it even sooner than you might think."

It is hard not to wonder whether McConnell's words are ringing in Reid's ears as the Boggs' nomination wends its way through the Senate.

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