Commentary

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Confirming Consensus Nominees Quickly

THE FEDERAL JUDICIARY is increasingly overworked, and its business is increasingly becoming drawn into partisan politics. The second phenomenon is exacerbating the first, with the judicial nomination process becoming politicized even at the district court level. While there is plenty of blame to go around, it is counterproductive to point fingers. This commentary proposes practical relief to the federal judiciary. By "practical relief," I mean that a proposal should account for the reality of increasingly polarized government. For instance, it is not enough to say that the President should make nominations more quickly, or that the Senate should vote on nominees more quickly. Only a large volume of consensus nominations, coupled with a more efficient process for confirming consensus nominees, can alleviate the crisis of judicial vacancies.

In that spirit, I offer the following proposal: When the 113th Congress convenes in January 2013, the Senate should adopt a rule that, when the Judiciary Committee reports a district court or court of appeals nominee without opposition, the Senate shall conduct a voice vote on the nomination within 48 hours.

A new report by Barry J. McMillion, federal judiciary analyst for the nonpartisan Congressional Research Service, starkly illustrates the rise in delays over the past three decades.[1] Despite the contentious 1987 nomination of Robert Bork to the Supreme Court, partisanship in some ways diminished during the George H.W. Bush administration. Although the average length of time from nomination to first hearing rose somewhat during the 1989 to 1993 period,[2] the full Senate was extraordinarily efficient in confirming nominees reported by the Judiciary Committee. The median length of time that a George H.W. Bush nominee waited from first Judiciary Committee report to confirmation as district judge or circuit judge was one day.[3] One day!

Perhaps as part of the partisan fallout from the confirmation of Justice Clarence Thomas, delays increased in 1993 and thereafter. For district court nominees, the wait time rose from one day to eight days during the Clinton administration, to 21 days during the George W. Bush Administration, and now to 90 days during the Obama administration. For court of appeals nominees, the wait time rose from one day to 14 days, to 18 days, and now to 132 days.[4]

This pattern has extended even to consensus nominations. For example, Tenth Circuit Judge Scott M. Matheson Jr. waited over six months from a unanimous Judiciary Committee vote on June 10, 2010, to a unanimous Senate confirmation by voice vote on Dec. 22, 2010. Similarly, the Judiciary Committee unanimously reported Fourth Circuit Judge James Wynn's nomination on Jan. 28, 2010, but it was not until Aug. 5, 2010, more than six months later, that the Senate confirmed Judge Wynn by unanimous consent. The delay for Judge Wynn, who took a seat that went unfilled for 16 years, came at a time when three of the Fourth Circuit's 15 seats were vacant.

Looking deeper into the data, the procedural explanation for these delays becomes apparent. From 1981 to 1993, virtually all district judge and circuit judge confirmations were by voice vote. During the Reagan administration, only five out of 83 (6 percent) of circuit judge confirmations and one of 290 (0.034 percent) of district court nominations were by roll call vote. Those numbers dropped even lower during the George H.W. Bush administration, to one of 42 (2.4 percent) for circuit judges and zero of 148 (0 percent) for district judges. For Clinton nominees, the numbers rose significantly, with roll call votes held for 24.6 percent of circuit court confirmations and 10.5 percent of district judge confirmations. But the numbers have spiked for nominees of the past two presidents, with over 80 percent of circuit court confirmations and over 50 percent of district court confirmations by roll call vote.[5]

More often than not, these roll call votes are mere formalities. Twelve of the 24 roll call votes confirming President Obama's circuit judge nominees have been unanimous.[6] As to district judge confirmations, 37 of 65 roll call votes have been unanimous.[7] These numbers would be higher but for the fact that Sen. Mike Lee of Utah, to protest the President's recess appointments to the National Labor Relations Board, has been voting against all judicial nominees, both in the Judiciary Committee and on the Senate floor, since January 2012.[8]

So long as roll call votes persist for consensus nominees, the judicial vacancy crisis will persist. Scheduling and conducting roll call votes takes time, forcing the majority to choose between its legislative agenda and confirming nominees. Voice votes, as were the norm until 1993, allow the Senate to focus on legislative business.

The delays associated with roll call votes are nonsensical in the case of consensus nominees. When the Senate Judiciary Committee reports a nominee unanimously, there is no need for any delay or debate. Each party entrusts its members on the committee to investigate and question each nominee. If the committee vote is unanimous, then the national interest favors that nominee receiving his or her seat on the judiciary. Moreover, by Judiciary Committee tradition, the fact that the nominee received a hearing at all means that both home-state senators returned "blue slips" allowing the hearing to proceed. Thus, the state interest also favors an immediate vote.

The Senate should therefore adopt a rule that, when the Judiciary Committee reports a nominee without opposition, the Senate shall conduct a voice vote on the nomination within 48 hours. Any senator may use that time to record his or her "nay" vote. Should some exigency arise, the Senate may of course vote to suspend the rule. But the default should be that consensus nominees receive speedy voice votes. It should take an act of political will to prevent a vote on a consensus nominee, not to hold such a vote in the first place.

Such a rule would encourage the President to select nonpartisan nominees with impeccable credentials. If this rule works—a point that I'll reach in a moment—the American people should receive swifter justice from more judges of unquestioned ability. And, the more we depoliticize the judicial selection process, the more confidence the public ultimately should have in the federal judiciary.

Who would be against such a rule? First, a cynic may attack this proposed rule as futile. The opposition party could simply designate one committee member to vote against each nomination to thwart the rule. That possibility exists. But it's not inevitable, and the nation would be no worse off for such an effort. Sen. Lee's protest is bound to end at some point between now and 2017. By then, or hopefully earlier, it is certain that at least some nominees will receive unanimous committee approval. Such a nominee is entitled to a floor vote without delay.

Second, perhaps some Senate purists would perceive some injury to the Senate's reputation as the greatest deliberative body in the world. But unanimously reported nominations aren't the stuff of great Senate debates. The proposed rule would clear consent nominations from the Executive Calendar without need for bargaining or roll call votes, leaving more time to debate matters of genuine public controversy.

Finally, a hyper-partisan could believe that the party that wins an election should fill the judiciary with partisan judges to push a political agenda over the course of a lifetime. Few publicly adhere to such a view, though many accuse their political opponents of such hyper-partisanship. If anyone genuinely wishes to politicize the judiciary, we should be happy to offend him or her.

For those who want to de-politicize the judicial confirmation process, I hope you agree that my proposed Senate rule change presents a practical, nonpartisan step in the right direction. If so, and if you have a direct line to a Senator, please pass along this proposal for aiding consensus nominees through this partisan thicket. **TFL**

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Endnotes

[1]Barry J. McMillion, Nominations to U.S. Circuit and District Courts by President Obama During the 111th and 112th Congresses (Congressional Research Service June 1, 2012).

[2]*Id.* at 27 (Table A-2).

[3]*Id.* (Table A-3).

[4]*Id.*

[5]*Id.* at 28 (Table A-4).

[6]*See* 111th Congress, 2nd Session (2010), Vote Nos. 1 (Beverly B. Martin), 21 (Joseph A. Greenaway, Jr.), 30 (Barbara Milano Keenan), 56 (O. Rogeriee Thompson), 123 (Denny Chin), 284 (Raymond Lohier, Jr.), 299 (Mary H. Murguia); 112th Congress, 1st Session (2011), Vote Nos. 47 (Jimmie V. Reyna), 154 (Henry Franklin Floyd), 188 (Stephen A. Higginson), 199 (Evan Wallach), and 209 (Christopher Droney).

[7]*See* 111th Congress, 1st Session (2009), Vote Nos. 299 (Jeffrey L. Viken), 324 (Roberto A. Lange), 328 (Irene C. Berger), 343 (Charlene Honeywell), 354 (Jacqueline H. Nguyen); 111th Congress, 2nd Session (2010), Vote Nos. 3 (Rosanna M. Peterson), 43 (William M. Conley), 128 (Gloria M. Navarro), 177 (Audrey G. Fleissig), 178 (Lucy H. Koh), 185 (Tanya Walton Pratt), 186 (Brian Anthony Jackson), 195 (Mark A. Goldsmith), 196 (Marc Thomas Treadwell), 201 (Gary Feinerman), 205 (Sharon Johnson Coleman), 280 (Ellen Lipton Hollander); 112th Congress, 1st Session (2011), Vote Nos. 12 (Diana Saldaña), 13 (Paul K. Holmes III), 15 (Edward J. Davilia), 26 (Steve C. Jones), 32 (James E. Shadid), 33 (Anthony J. Battaglia), 38 (Max O. Cogburn, Jr.), 39 (James E. Boasberg), 45 (Amy Berman Jackson), 46 (Mae A. D'Agostino), 58 (John A. Kronstadt), 62 (Kevin H. Sharp), 69 (Arenda L. Wright Allen), 70 (Michael F. Urbanski), 88 (Claire C. Cecchi), 117 (Paul A. Engelmayer), 140 (Timothy M. Cain), 158 (Jane Margaret Triche-Milazzo), 197 (Scott W. Skavdahl), 221 (Edgardo Ramos).

[8]Betsy Woodruff, *Lee Will Vote Against Obama's Judiciary Appointee Today*, National Review Online (June 4, 2012).