



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

'Judicial Emergencies' Near Breaking Point As Nominees Languish

By Sindhu Sundar

Law360, New York (November 27, 2016, 7:40 PM EST) --

'Judicial Emergencies' Near Breaking Point As Nominees Languish

By Sindhu Sundar

November 28, 2016

Interstate 84 from Boise to the nearest federal courthouse in Pocatello, a mountain city roughly 230 miles east near the Bannock Range, is a winding, 3 1/2-hour drive. At least once a week, Idaho's chief federal district judge, B. Lynn Winmill, weathers the soporific haul through the plain, commuting between the offices he keeps in both cities.

In the winter, the snow renders the highway so treacherous that it can easily add more than an hour to the trip. But as the state's only remaining full-time federal district judge, he does not squander precious hours behind the wheel. His wife drives while he reads briefs and presentencing memorandums on a touch screen tablet perched on his lap.

Ever since U.S. District Judge Edward Lodge assumed senior status in July last year, cutting his caseload down by a third, the already-understaffed Idaho federal court system has started to buckle. Judge Winmill's weighted caseload, the number of cases on his docket each year adjusted to account for their complexity, soared nearly 11 percent to 520, well above the national average of 492. State Judge David Nye, who was nominated to replace Judge Lodge, has waited in the wings since April with little clarity on when, if at all, he will be appointed.

Judge Nye has already cleared the biggest hurdles in the judicial selection process: He was recommended by the state's two Republican senators, nominated by President Barack Obama, and reported out of the Senate Judiciary Committee after his confirmation hearing in July. He now needs only a final up or down vote before the full Senate floor, practically a five-minute formality, before his official appointment to the federal court. But he is one of about 20 federal district court nominees waiting in limbo at that phase, as the Senate majority leader, Kentucky Republican Mitch McConnell, has refused to schedule the nominees' final floor vote in an election year.

Meanwhile, Judge Winmill, his staff and two magistrate judges have borne the brunt of the delay. The state's federal court system has two full-time Article III district judge positions, though only one

— Judge Winmill's — is presently occupied. The other, vacant since Judge Lodge's retreat to senior status, is considered a "judicial emergency" by the Administrative Office of the U.S. Courts — one of 38 nationwide.

Since last July, Judge Winmill and the magistrate judges have scrambled through a thicket of criminal cases to meet the requirements of the Speedy Trial Act of 1974. The state's main federal courthouses are in Boise, Pocatello and Coeur d'Alene, hundreds of miles apart. Coeur d'Alene, a resort town in the far northern tip of the state, is separated from the other two cities by the Sawtooth Range, making driving between the courthouses nearly impossible. Once or twice a month, Judge Winmill hops on a plane from Boise to Spokane, then drives back east from Washington in a rental car to reach the Coeur d'Alene outpost.



"In our court, our offices are spread apart the same as the courts between D.C., Pittsburgh, Boston," Judge Winmill, 64, said in an interview. "It's one of the reasons I frankly plan on going senior in the very near future, because it wears on you. The traveling is symbolic of the problems in this district."

On The Road

Large distances and unique geographical barriers in Idaho exacerbate the strain imposed by the shortage of judicial resources. "The folks in Washington don't understand the challenges of us having offices so far apart," Libby Smith, Idaho's federal clerk of court, said. "Sure, you can do some work on a plane, but when you're driving at 80 mph, there's nothing else to do."

Boise → Pocatello	234 miles	Pittsburgh → Washington, D.C.	240 miles
Pocatello → Coeur d'Alene	530 miles	Pittsburgh → Boston	572 miles
Boise → Coeur d'Alene	459 miles	Washington, D.C. → Boston	438 miles

Idaho distances calculated using shortest driving times via Google maps.

Aside from Idaho's, more than a hundred vacancies are spread across the federal judiciary, including one on the Supreme Court, as Obama prepares to leave office. Fifty-nine of those vacancies have

nominees, and bar and advocacy groups have warned that ongoing delays in confirmations will aggravate a staffing crisis to its breaking point.

District judges are putting in more and more hours to keep the courts afloat, and magistrate judges are being increasingly called upon to pick up the slack. Lawyers are seeing long waits for cases to go to trial and canceled oral arguments sessions, leading to tough conversations with clients who had sought their day in court.

The election on Nov. 8 of Republican Donald Trump and the GOP’s continued control of the Senate and the House may eventually break the logjam, and Trump’s presidential campaign has offered signs that filling court vacancies would be a priority for his administration. Twice this year, he put forward his short list of candidates for the Supreme Court vacancy, consulting with conservative groups including the Federalist Society and the Heritage Foundation in compiling 21 candidates.

Carrie Severino, chief counsel at the conservative Judicial Crisis Network, said Trump’s attention to the judiciary during his campaign indicates that he will prioritize the issue of vacancies more broadly in all federal courts.

“We’ve seen that he made a key point of addressing the issue of judges, especially on the Supreme Court, in his campaign,” she said.

Following the GOP’s Election Day triumph, though, the Senate may let pending nominations lapse, restarting the process with a clean slate come Jan. 3, when the first session of the 115th Congress is set to begin.

“It would be wonderful to think they’d be conciliatory and get their jobs done and confirm all pending nominees,” said Nan Aron, the president of the liberal Alliance for Justice. “But the Republicans in the Senate are not in any mood — or, they have not indicated any desire to vote on pending nominees.”

Anatomy of a Crisis

The issue of judicial vacancies has taken on a tone of renewed urgency during the Obama administration, particularly since the GOP regained control of the Senate in the 2014 midterms.

The current Congress has confirmed 22 federal district and appeals court judges since 2015, a record low. That figure for the last two years of George W. Bush’s presidency, when the Senate was controlled by Democrats, was 68.

There were only about 40 federal district court vacancies at the start of January 2009, when Obama took office, a number that has more than doubled to 81 — representing about 12 percent of the 657 U.S. federal district court positions. By comparison, there were 30 vacancies in federal district courts

toward the end of Bush's tenure in December 2008, when the Senate was controlled by Democrats. As of Dec. 1, 2008, 15 vacancies across the federal judiciary were considered emergencies, compared with the 38 currently under Obama.

The Administrative Office of the U.S. Courts considers a federal district court vacancy an emergency in three instances: if each judge has more than 600 weighted filings, if a vacancy has lasted more than a year and a half while each remaining judge is fielding 430 to 600 weighted filings each year, or if a court has a vacancy while there is only one active district judge.

The problem emerged in the Obama administration's early years. Chief Justice John Roberts broached the subject in his federal judiciary report for 2010, raising concern over "the persistent problem of judicial vacancies in critically overworked districts." The impact of the unfilled vacancies was exacerbated by the significant increase in caseloads that year, he wrote, citing a 2 percent increase in the number of civil and criminal filings in U.S. district courts.

Amid the escalating crisis, the Democratic Senate majority in 2013 exercised the so-called nuclear option by changing filibuster rules so that judicial nominees could be appointed with an up or down vote rather than a 60-vote supermajority, a move Republicans decried.

"Once the Senate definitively breaks the rules to change the rules, the pressure to respond in kind will be irresistible to future majorities," McConnell said on the Senate floor at the time. "The precedent will have been firmly and dramatically set."

On The Floor, Backed By GOP Senators

Thirteen federal judicial nominees on the floor have the support of their Republican home state senators



Senate Majority Leader **Mitch McConnell** has refused to schedule these federal judicial nominees' final floor vote in an election year.



Edward Stanton III
Western District of Tennessee



Susan Baxter
Western District of Pennsylvania




Marilyn Horan
Western District of Pennsylvania



Ronald Russell
District of Utah



Suzanne Mitchell
Western District of Oklahoma



Scott Palk
Western District of Oklahoma



Stephanie Finley
Western District of Louisiana



Claude Kelly III
Eastern District of Louisiana

Other "Uncontroversial" Nominees

- Inga S. Bernstein
- Mary S. McElroy
- Gary Richard Brown
- Kathleen Marie Sweet
- Julien Xavier Neals
- Stephanie A. Gallagher
- Mark A. Young
- Clare E. Connors
- Florence Y. Pan



Winfield Ong
Southern District of Indiana



Donald Coggins Jr.
District of South Carolina



David Nye
District of Idaho



Jennifer Puhl
Eighth Circuit Court of Appeals



Don Schott
Seventh Circuit Court of Appeals

The rule change allowed the Senate to confirm 89 judges in 2014, according to the Alliance for Justice, which the group said marked the highest number of federal judicial confirmations in a single year since 1994.

But the spell was short-lived. Once the GOP regained control of the Senate in the 2014 midterms, the number of federal judicial confirmations dropped to 11 in 2015.

Conservatives have defended the GOP's handling of judicial nominees and attributed the vacancies to a controversial election year climate and Obama's own delays in nominating candidates to federal courts.

"He was more focused on issues like health care and didn't prioritize nominating judges in his first term and into his second term," Severino said.

GOP leaders have also noted that the Senate has confirmed more nominees under Obama than under Bush. According to the federal court system's compilation of data on judicial appointments

under Bush and Obama, there were a total of 263 federal judicial confirmations over the course of Bush’s entire eight-year tenure, whereas Obama practically caught up to that figure by the end of 2015, with 262 federal judicial appointments by then.

But critics across party lines say the number of vacancies amid a higher caseload depicts a more accurate portrait of the problem. A little over 244,000 civil cases were filed in federal district courts over the course of a year ending in March 2006, according to the federal court data. During the year ending in March 2015, that figure was more than 281,000, a more than 15 percent increase.

“It’s interesting because if you look statistically and historically about the number of vacancies that have been filled, we have filled and nominated more individuals than in previous administrations,” said Rachel Rose, an attorney in Houston and registered Independent who is a member of the Federal Bar Association government relations committee. “But we have a greater number of cases than we did in the past, and immigration issues in border states that are very significant.”

The problem is particularly pronounced in Texas, where all 11 of its federal district court vacancies — out of a total of 52 judgeships in the state’s federal district courts — are considered judicial emergencies.



A stretch of Interstate 84 along the 234-mile commute from Boise to Pocatello. (Todd Meier/For Law360)

The Life of a Judge

When New Jersey’s chief federal district judge, Jerome Simandle, announced at a quarterly meeting in Trenton this summer that a committee of the Judicial Conference was thinking about recommending five new federal district court judgeships in the state, more than a dozen colleagues on the bench surprised him when they broke into instant applause.

The Judicial Conference, which is led by Chief Justice Roberts and issues administrative guidance for federal courts, surveys federal courts every two years to determine whether they need more judges on the bench before submitting its recommendations to Congress. The last time a committee of the Judicial Conference conducted the survey in New Jersey was in 2015, when it found that the federal district court there needed four more judgeships. This year, the committee told Judge Simandle that it was planning to recommend one more judgeship on top of that.

The last time New Jersey's federal courts had actually received a new judgeship was in 1990, and, in fact, it was Judge Simandle who filled that newly created position as the court's 17th federal district judge. Since then, the court's caseload has increased by roughly 50 percent, he said, citing the court's internal records.

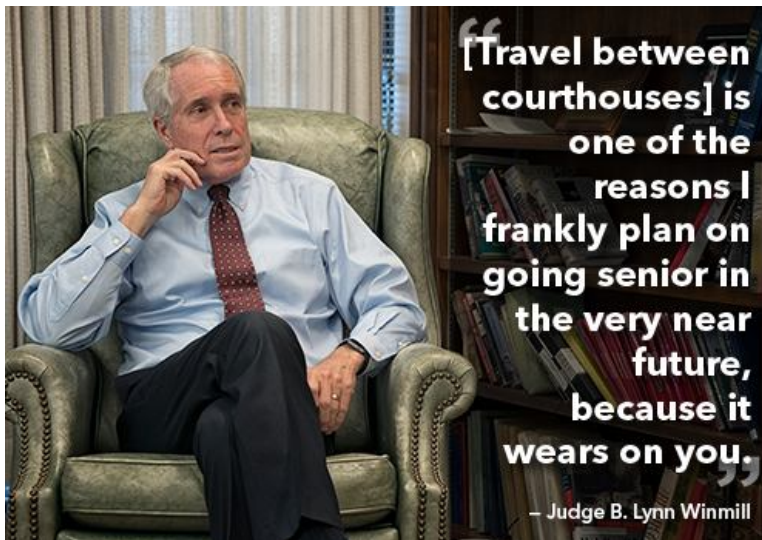
"When I announced [at that meeting] that we had received a preliminary indication that we're going to be recommended to Congress for five new judges, I didn't mean it as an applause line," Judge Simandle said in an interview. "When I heard [clapping] I thought, 'Holy cow, this is a lot of pent-up stuff.' It was really a cathartic moment."

The court took in more than 9,600 new filings over the course of a year ending in June, a 10 percent increase from the same time period ending in June 2011, according to the Administrative Office of the U.S. Courts. Its proportion of pending cases more than three years old, an indicator of the number of "old cases" languishing with slimming odds of trial or resolution, has risen to more than 6 percent of its docket, up from 5 percent in June 2011, Judge Simandle noted, citing federal court data. Over the year ending in June 2015, New Jersey's federal courts took in more than 10,000 filings for the first time in its more than 220-year history.

The New Jersey district court system currently has two judicial vacancies. Both are in Newark, and both are considered judicial emergencies.

Only one of New Jersey's two vacancies has a nominee, Bergen County counsel Julien Xavier Neals, who has been waiting since February 2015 for his appointment. Like Judge Nye in Idaho, Neals has cleared all the hurdles to appointment other than the final vote. The position for which there is still no nominee has remained vacant since February 2015.

Meanwhile, the federal judges, supported by magistrate judges and law clerks, have helped each other address shortages, working minimum 60-hour weeks, Judge Simandle said. Judges in Camden, including Judge Simandle, have taken on some of the overflow of cases from Newark, and much of his schedule is devoted to dealing with the expanding scope of motion practice rather than trials.



“Motions that used to be couple dozen pages, now they will fill a box,” he said. “Because it’s almost become a substitute in the parties’ minds for trials. And so that’s where the crunch really comes.”

With 15 federal district judges in the state currently doing the work of what should theoretically be 22 judges, “something has to give,” Judge Simandle said.

“I used to have free nights and weekends,” he said. “Now, after working here 10 to 11 hours each day, I’m still taking home a full briefcase.”

“And I’m not saying this for sympathy,” he added. “If I don’t do that, I don’t think I’m doing the job I took an oath to do.”

Judge Simandle’s wife is one of the keenest witnesses to his daily grind. His workday begins at around 8 a.m., and while he leaves court at around 7 p.m. — “That’s the latest my wife is willing to hold dinner,” he said — he continues to work at home at night.

When Idaho’s Judge Winmill visited his daughter in Denver in October, it was his first time visiting her and his grandchildren in the year and a half she’s lived there, he said. And even that was because of a George Mason University conference on antitrust law he was scheduled to attend that had been canceled at the last minute.

Libby Smith, the federal clerk of court for Idaho, said judges in her district work 60 to 70 hours a week, and clerks and administrators also often work in chambers on weekends and holidays.

“I sit in here my office on a Saturday, and I see cars out there, judges’ cars in the garage — it’s necessary to even tread water with the workload, and I don’t think the public understands that,” she said. “I love what I do, and I’m really fortunate to be a federal court clerk. It’s just, I’m not sure people fully appreciate the sacrifices being made in this district to make sure that justice is served.”

Shira Scheindlin, now counsel at Stroock & Stroock & Lavan LLP, was a judge in New York’s Southern District for over two decades until she retired in April. She attested to the workload of federal judges even in a jurisdiction that did not have a comparable shortage of resources.

Even with more than 40 federal district judges, the SDNY bench still worked 10-hour-a-day schedules for 6 1/2 days a week, she said. Part of that was a function of the high complexity of cases the Southern District received, including securities fraud, antitrust, environmental and large commercial matters.

As of June 2016, the average weighted caseload per judgeship was 471 in New York’s Southern District. For New Jersey, which sees a high number of patent and multidistrict suits, that figure was 511.

“There are many different kinds of legal events in the life of a complex case, marked by the main different motions — the motion to dismiss, for summary judgment, class certification, and motions in limine — before a case can resolve,” Scheindlin said. “Federal judges have to do a lot of writing in issuing decisions. It’s not like state courts, where a lot of that often happens from the bench.”

Like New Jersey, Idaho is due for more judicial resources — the Judicial Conference recommended in 2015 that Congress add a new judgeship to the state in light of its population and caseload. In the meantime, the state’s federal courts have 24 visiting federal judges from the rest of the Ninth Circuit who step in to share the workload, Smith said.

“It’s significant that we have that number of judges who have raised their hands and volunteered to assist us,” she said. “If we had three district judgeships, we could have a district judge in each location.”

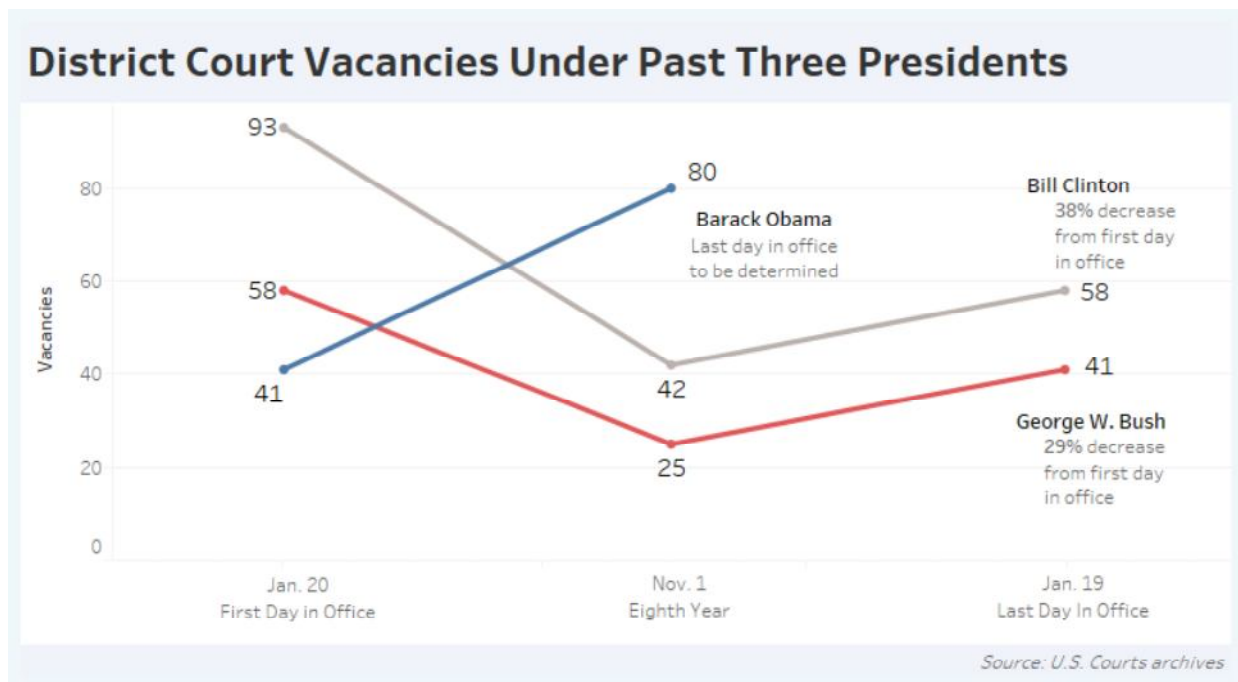
The state’s two federal magistrate judges also travel frequently between the three main courthouses, a significant drain of time and judicial funding. Smith also pointed to the unequal distribution of judicial resources among different federal district courts.

The federal court system in Maine, for example, has a slightly lower population than Idaho’s and only 277 weighted filings per judgeship, or roughly half of Judge Winmill’s weighted caseload. It has three district court judgeships, and Smith said the divide in resources between the states is wider than it first appears because of the staff and law clerks who accompany each position.

In 2015, the Judicial Conference said that, in order for courts to perform at optimal levels, Congress should establish 68 district court judgeships, particularly in states including New Jersey, Texas, Florida and New York, where there have been a notable number of vacancies for extended periods of time.

But after that the ball is in the legislators' court. Some note that this has posed a problem particularly to Obama, who has seen no new judgeships added under his administration.

"He is the first president since President [Gerald] Ford to have had no new judgeships authorized during his presidency despite the rapidly increasing caseloads," said Lena Zwarenstejn, a director at the American Constitution Society for Law and Policy, a liberal advocacy group. "This further compounds the dramatic increase in the number of vacancies."



Fallout for Lawyers

The shortage of judicial resources has interfered with the administration of justice in quantifiable ways, according to federal court data. Overall, cases take longer to get to trial from when they are filed — more than 27 months as of June 2016 compared to fewer than 25 months as of June 2011. A larger portion of civil cases are more than three years old — 14.3 percent this year compared with 13.1 percent in 2011. And the average number of weighted filings per judge has hovered close to 500 in the past five years.

It takes a median time of nearly four years for a civil case in New Jersey to go from filing to trial. On that metric, it ranks 64th among 94 federal district courts.

Judge Simandle said the courts there are increasingly relying on magistrate judges to manage and help settle cases. Magistrates in the state handle nondispositive motions including discovery motions and motions to amend, and they conduct case management conferences, while district judges handle dispositive motions and trials. As district judges try to make more room for trials, other aspects of the pretrial process are pushed to the fringes of the ever-extending workday.

"I've had the experience of judges having conferences earlier in the day than they used to, and later in the evening than they used to," said John Keefe, a litigator at Keefe Bartels, a plaintiffs firm in Monmouth County.

"The judges know they have to have balance," said Keefe, who is also the vice president of the New Jersey State Bar Association. "They know, 'If I stay in my chambers and just resolve motions then I'm not going to be on the bench trying cases.' So they're trying cases during court hours and working after hours, trying to put a dent into the volume of motions."

The Central District of California, another jurisdiction with an emergency judicial vacancy, is a sprawling expanse that stretches from Orange County to San Luis Obispo County more than 250 miles north, and from the Pacific coast to the border of Arizona. The jurisdiction has more than 19 million residents, making up the largest population of any district.

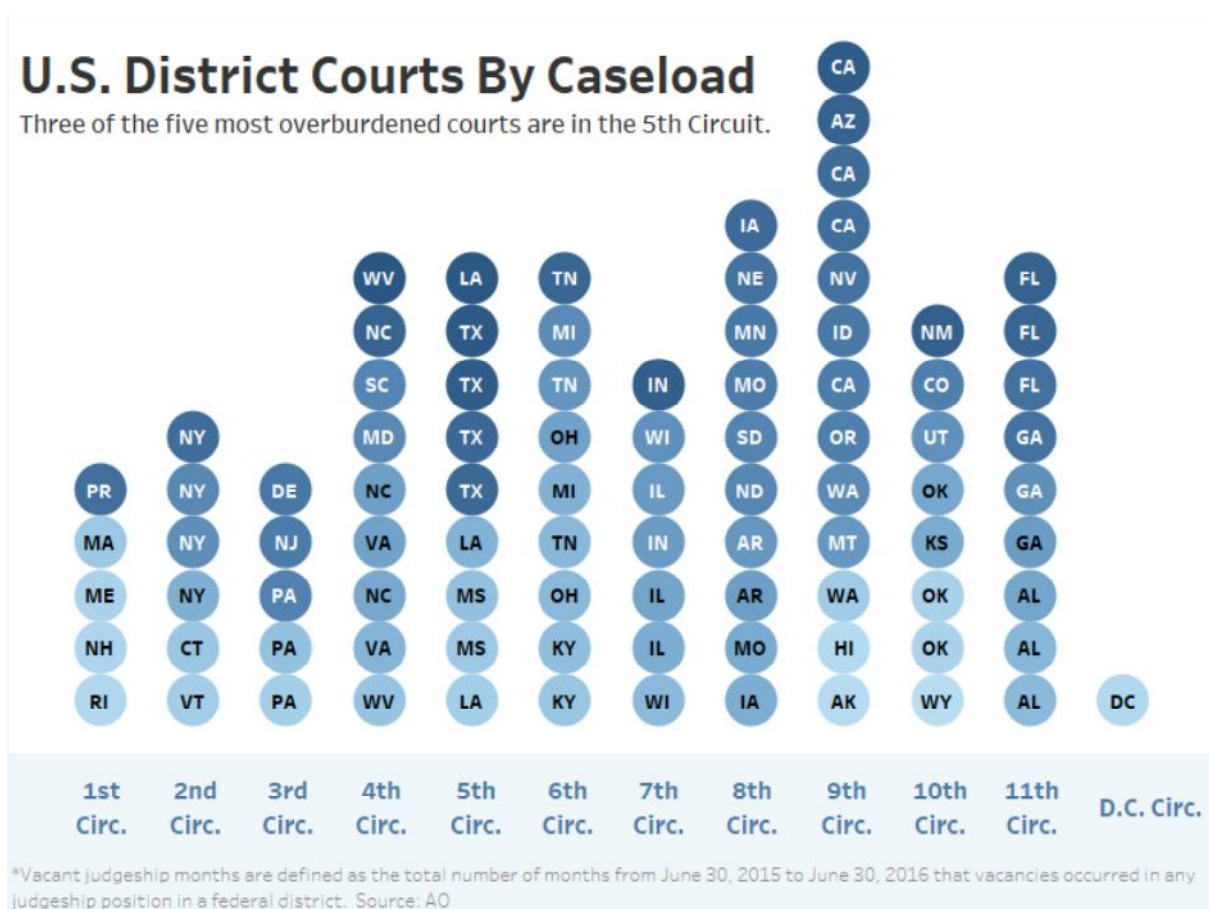
The jurisdiction has 28 judgeships and three vacancies, one of which — left by Judge Audrey Collins' retirement in August 2014 — is considered an emergency. Judges in the jurisdiction have 566 weighted filings each, but civil cases take only about 20 months to get to trial, ranking it 11th among 94 federal district courts on that metric. Defense and plaintiffs attorneys in the jurisdiction have attributed this relatively quick time frame in part to the lack of judicial resources, which can force litigants to settle early in the process. The time it takes in the jurisdiction for civil cases to be disposed is actually shorter now than in 2011: five months as of June 2016, compared with 5.7 months five years ago.

Seth Aronson, a partner at O'Melveny & Myers LLP's Los Angeles office, pointed to the difficulties in preserving evidence in long-running cases.

"Memories fade, witnesses might be unavailable, and lawyers' and clients' passion for their causes diminishes," he said.

Attorneys say that parties have also often had to forgo the venue of oral arguments as judges either avoid scheduling them or cancel them at the last minute because of time constraints. Michael Geibelson, managing partner of Robins Kaplan LLP's Los Angeles and Silicon Valley offices, said he has experienced scenarios over the past year where oral arguments were canceled as late as the night before, which translates to wasted legal resources and only higher litigation costs for clients.

"The oral argument is an opportunity to correct issues or arguments that may be not as clear as they should be in the papers," Geibelson said. "In the absence of them, clients view the process as not getting their day in court. And as a lawyer, to go back and tell a client that the judge canceled oral argument 12 hours before it was going to happen, when the cost of litigation is already high, that's difficult."



[Click to view interactive version](#)

Stuck in Limbo

During a Senate session in June, Massachusetts Democrat Elizabeth Warren sparred with McConnell on the fate of the 15 nominees at the time who needed just an up or down vote to take the bench, imploring the GOP majority leader to schedule it. But as McConnell parried her entreaties with brief objections, an increasingly exasperated Warren attempted to negotiate.

“If you won’t give all 15 judges their votes, let’s at least have a vote on the nine district court nominees who had their Judiciary Committee hearings last year,” she said. By that point, those nominees had already been waiting for more than six months since their confirmation hearings, which she stressed was unusual for “uncontroversial” nominees, or nominees who are not opposed by either party’s lawmakers.

“When President Reagan was in office, almost no uncontroversial nominees took longer than 100 days to confirm from the day they were nominated,” she said.

McConnell was resolute. “Mr. President, reserving the right to object,” he said, repeating a frequent refrain during the heated exchange, in which he did not offer a reason for the objection to any specific nominee.

Of the 44 federal district nominees, at least 20 are considered to be uncontroversial. They have cleared background checks as well as confirmation hearings before the Senate Judiciary Committee, but they have yet to receive a final floor vote to formalize their appointment.

One nominee with bipartisan backing who made it to the finish line is Nebraska’s newest federal district judge, Robert Rossiter, who received his final vote in late June, a year after he was first nominated by Obama. The process in the past has usually been resolved in a matter of months, according to Tom Maul, the state bar association’s president, who helped push for his appointment.

Maul described how a yearlong saga that had started out efficiently enough broke down as Rossiter drew closer to appointment.

In 2014, Nebraska Sen. Deborah Fischer and her colleague at the time, Mike Johanns, followed a protocol that many others observe. They put together a committee of attorneys to go over applications for the vacancy created by U.S. District Judge Joseph F. Bataillon, who took senior status that year. From the short list emerged Rossiter, who had been a litigator at Fraser Stryker PC LLO for over three decades. When the Republican senators recommended him to the White House some time in late 2014 or early 2015, Maul recalled, the president responded quickly.

“We had two senators saying, ‘This is the guy we want,’ and Obama said, ‘OK, you’re both Republican senators, and if you’re telling me this is your person, I’m good with that,’” Maul said, paraphrasing the conversation between the senators and the White House.

After the nomination, Rossiter’s hearing before the Senate Judiciary Committee quickly followed suit.

“We were pretty happy at that point. It got to the president, there was no argument between our senators, they’re lockstep on this, and the president doesn’t mess around, says, ‘That’s who you want, that’s who I’ll nominate,’” Maul said. “And then it sat.”

Even for election-year antics, the protest against a nominee with Republican support has baffled observers like Maul, who bemoaned congressional foot-dragging.

“It would be my opinion, that yes, those of us who are registered Republicans, and who are very interested and concerned about the filling of federal judicial vacancies in general, and more specifically in the position that Rossiter was ultimately appointed to, very much believe that the cause of the inexcusable delays is because of the GOP leadership’s reluctance to schedule votes,” Maul said.

Rose, of the Federal Bar Association government relations committee, said the culture on the Hill has grown more combative. She had experienced a much more collegial atmosphere when she worked as an intern and a staff assistant in the late 1990s to U.S. Rep. Bill Clinger, a Pennsylvania Republican, she added.

"The collaboration that you once saw and the ability to have varying views on issues, where you could meet up for coffee or cocktail parties and discuss things, is not there," Rose said. "Part of it now is also that in this race in particular, there was a lot of mudslinging."

"I'm an Independent, and can say it from a neutral perspective," she added. "I've seen it firsthand."

*Sindhu Sundar is a feature reporter who **last wrote** about the legal industry's sexual harassment problem. Follow Sindhu on **Twitter**.*

All Content © 2003-2016, Portfolio Media, Inc.