

Good News: Judicial Vacancies Continue to Decline

by Bruce Moyer



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The Federal Bar Association's constant focus on the nomination of candidates to the federal bench is centered on keeping federal judicial vacancies as low as possible. When judicial vacancies exist, the capacity of our courts to deliver justice in a timely manner suffers. At worst, vacancies undermine the prompt administration of justice, harm the financial interests of litigants, and erode public respect for the efficiency of our judicial system.

While the FBA remains nonpartisan and does not vet or rate federal judicial nominees, it continually monitors the state of judicial vacancies, with advocacy for prompt action by the president and the Senate in fulfilling their constitutional obligations. The FBA's goal is to ensure that bench strength in each judicial district and circuit operates at maximum capacity. This achieves the underlying commitment of Congress, in establishing every judgeship after careful review of caseload data, to see that justice is promptly delivered.

We have witnessed in recent years a crisis in judicial vacancies. By early 2018, vacancies reached a high-water mark of 155 unfilled seats on the federal bench, representing 18 percent of all district and circuit judgeships. Senate foot-dragging and procedural gamesmanship by minority Democrats had slowed the path of confirmation of judicial candidates nominated by President Donald Trump. But more recently, and particularly over the past seven months, the pace of confirmations has rapidly picked up. By Oct. 1, the number of Article III judicial vacancies had fallen to 94. Since January alone, 63 judicial nominees had been confirmed.

What's Caused the Vacancies Decline?

Several factors have been at work in oiling the Senate gears to "advise and consent." In April 2019, Senate Majority Leader Mitch McConnell, R-Ky., reinterpreted Senate Rule XXII and reduced the time available for final debate on district judge and subcabinet nominees from 30 hours to two hours. In addition, Senate Judiciary Committee Chairman Lindsey Graham, R-S.C., announced lesser allegiance to the "blue slip" tradition, reducing the leverage of home state senators opposed

to a nominee to deny a committee hearing and effectively block their nomination. These developments have considerably reduced the procedural leverage of the minority to delay and obstruct confirmations.

More profoundly, changes in Senate confirmation practices first installed by Senate Democrats in 2013 rebounded to the benefit of Republicans after they regained control of both the White House and the Senate in 2016. Former Senate Majority Leader Harry Reid's decision in 2013 to eliminate filibusters of district and circuit judge nominees, thereby lowering the number of votes to end floor debate (called "cloture") from 60 to a bare majority of 51, was consequential. In 2017, McConnell extended the cloture rule to Supreme Court nominees, leading to the confirmation of Neil Gorsuch (on a 55-45 vote) and Brett Kavanaugh (on a 51-49 vote) as associate justices of the Supreme Court.

Zero Vacancies by 2021?

Cumulatively, all this means that as of Oct. 1, the 984th day of Trump's presidency, the Senate had confirmed 152 Article III judges nominated by President Trump, including 43 appellate judges. That is the third-fastest confirmation pace in American history, and the speediest pace in confirming appellate judges of any American president. The Senate confirmation machine shows no sign of slowing down. McConnell in September predicted that every judicial vacancy would be filled by the end of President Trump's term next year, significantly transforming the federal courts.

In the meantime, at press time 92 district vacancies (and four circuit vacancies) remained, a not inconsiderable number given bench capacity considerations. Roughly two-thirds of those slots awaited the naming of nominees by the president, many of them in blue states and considered "judicial emergencies" by the federal judiciary because of their high caseloads and the length of time they have remained unfilled. Indeed, a long way to go remains for Sen. McConnell to achieve his goal of zero vacancies by the end of 2020. ☺