



Experts Dispel Myth that Confirmations Should Stop in Election Year

With High Vacancy Rate, Senate Needs to Act on Languishing Judicial Selections

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Whatever one calls it, obstruction of judicial nominees continues unabated in the U.S. Senate, exacerbating an already dire situation, several experts on the judicial nominations process explained during a high-level briefing call hosted by the American Constitution Society for Law and Policy (ACS).

Recently Senate Republicans have cited the so-called Thurmond Rule in halting consideration of judicial nominations during an election year. Under the “rule,” sometime during the summer of a presidential election year, the Senate generally stops confirming judicial nominees unless the Senate leaders of both parties and the Judiciary Committee agree to move forward.

The “rule” is named for the late Sen. Strom Thurmond (R-S.C.) who opposed President Lyndon Johnson’s nomination of Abe Fortas to be Chief Justice of the U.S. Supreme Court in 1968. During that nomination fight, Thurmond led Republican senators in a filibuster of the nomination and ultimately insisted upon waiting until the next president was elected that November to consider a new nominee.

But as experts on today’s ACS call explained, this “rule” is not actually a formal Senate rule at all, noting that over the last few decades confirmations of judicial nominations have continued well into presidential and other election years.

During today’s call, experts such as **ACS President Caroline Fredrickson** and **Christopher Kang**, senior counsel to President Obama, noted that with 94 total vacancies (77 current and 17 future) on the federal bench, now is not the time to halt consideration of judicial nominations. Of the 94 vacancies, 34 are considered judicial emergencies as defined by the Administrative Office of the U.S. Courts. Seventeen are currently languishing on the Senate floor, with the number expected to reach 22 by month’s end.

Below are statements on the judicial nominations crisis from participants or their representatives on today’s ACS call:

Fredrickson: “With close to 80 vacant seats on the federal bench and a rising number of those causing a serious backlog of cases, too many Americans are losing access to our courts. The direct impact is that justice comes far too late or not at all for ordinary Americans, whose safety, freedom and livelihoods rest upon the outcome of court action.”

Sen. Patrick Leahy, *Senate Judiciary Committee Chairman*: “The judicial vacancy rate today remains nearly twice what it was at this point in the first term of President Bush, and has remained near or above 80 for nearly three years. If we could move forward to Senate votes on the nearly 20 judicial nominees ready for final action, the Senate could reduce vacancies below 60 and make progress. The Senate needs to consider these judicial nominees if we are to make real progress in reducing the burden of judicial vacancies. That is what we did in the most recent presidential election years of 2004 and 2008 and what we should be doing this year. We have a long way to go.”

Hon. Timothy K. Lewis, *former judge for the U.S. Court of Appeals for the Third Circuit*: “Federal judges have reported being forced to handle criminal caseloads more than double what they confronted just two years ago. This, in turn, is limiting the access people have to the judicial system, often resulting in exasperating delays for all parties involved. ‘Justice delayed is justice denied’ isn’t just an old legal maxim – it should be a rallying call to action.”

Russell Wheeler, *Visiting Fellow, Brookings Institution*: “The Thurmond ‘Rule’ is nothing akin to a mandate or requirement. In the four most recent presidential election years, confirmations slowed but hardly ceased, even after June for district nominees. Should confirmations stop in mid-May, 2012 will have seen fewer district and circuit confirmations than did the three previous presidential election years.”

To speak with Fredrickson, contact Jeremy Leaming at jleaming@acslaw.org or (202) 393-6181.

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