

Carolyn B. Lamm
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August 6, 2010

Dear Senator:

Yesterday, on behalf of the American Bar Association, I sent the attached letter to President Obama and select Senate leaders urging them to make the filling of judicial vacancies a priority and to work cooperatively to reduce the high vacancy rate as quickly as possible. I am writing you to make the same urgent request for your help in resolving the problems that are preventing the prompt scheduling of Senate floor action on judicial nominees, even those reported out of the Senate Judiciary Committee with no opposition.

Despite the confirmation of 37 Article III judges this Congress, the number of vacancies has hovered around the 100-mark for over six months. We are deeply concerned that the partisanship that has long characterized the process and the persistently high number of vacancies are creating strains that will inevitably reduce the quality of our justice system and erode public confidence in the independence and impartiality of our federal courts. This is a result we, as a nation, can ill-afford: all three branches must be robust and strong to advance the important work of government.

Every member of the Senate is a vital player in the nomination and confirmation process. The sense of purpose that each member brings to the process creates a political environment that is either conducive to the prompt filling of vacancies or tolerant of tactics that stall action on nominees. We urge you to keep in mind the central importance of a strong federal judiciary and to reach across the aisle to try to find constructive ways to increase bipartisan accord and work cooperatively so that individuals of the highest caliber are promptly confirmed to the federal bench.

The ABA stands ready to assist your efforts in any way we can. Please contact Denise Cardman, Deputy Director of the ABA Governmental Affairs Office, at cardmand@staff.abanet.org if we can help.

Sincerely,



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The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

The Honorable Harry Reid
Majority Leader, U.S. Senate
522 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader, U.S. Senate
361-A Russell Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Chair, Senate Judiciary Committee
433 Russell Senate Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
335 Russell Senate Office Building
Washington, D.C. 20510

Dear President Obama, Majority Leader Reid, Minority Leader McConnell, Chairman Leahy,
and Senator Sessions:

Now that the Senate has concluded another historic debate and vote on a nominee to the U.S. Supreme Court and is about to recess for its summer break, I am writing to express the American Bar Association's mounting concern over the persistently high number of judicial vacancies on our federal district courts and courts of appeals. I urge you, upon your return to Washington in September, to make the filling of judicial vacancies a priority for the Administration and for the Senate. As lawyers who represent our clients in federal courts across this nation, members of the American Bar Association know first hand that longstanding vacancies and protracted delays in the nomination and confirmation process do great harm to the federal judiciary and to public life.

Despite the confirmation of 37 Article III judges during the 111th Congress, the vacancy rate has not dropped below 10 percent since last August. For the past six months, the vacancy rate has remained at over 11 percent, and the number of vacancies has hovered around the 100 mark. The lack of progress in reducing the vacancy rate this session is especially worrisome in light of the number of judges who have reached, or are fast approaching, retirement age: eighteen judges have announced their intention to retire in the next year, and several additional vacancies will no doubt arise as a result of judicial elevations, deaths and resignations. If the nomination and confirmation process does not speed up significantly, confirmations will not even keep pace with the rate of attrition. The high number of vacancies, combined with the low number of confirmations, has created a problem that is fast approaching crisis proportion.

Vacancies have different effects on different courts. Those courts with relatively normal caseloads per judgeship and a sufficient number of active judges may be able to absorb the extra workload and operate normally if vacancies are filled within a reasonable time. In contrast, courts that already are operating with staggering caseloads and too few authorized judgeships are strained beyond capacity by unfilled vacancies and are unable to keep up with the workload

In these jurisdictions, persistent vacancies make it impossible for the remaining judges on the court to give each case the time it deserves; community and business life suffers because short-handed courts have no choice but to delay civil trial dockets due to the Speedy Trial Act; and courts are forced to adopt time-saving procedures, some of which may serve efficiency at the price of altering the delivery and quality of justice over time in ways not intended. The harm caused by persistent vacancies on these courts may reach into the future, too: if no abatement of these conditions is in sight, the specter of this kind of work environment is likely to result in additional judicial retirements and resignations and deter excellent attorneys from seeking positions on the federal bench.

Lawyers who practice regularly in the federal courts and their clients who expect timely judicial resolution of their disputes are deeply concerned that the partisanship that has long characterized the process and the persistently high number of vacancies are creating strains that will inevitably reduce the quality of our justice system and erode public confidence in the independence and impartiality of our federal courts. This is a result we, as a nation, can ill-afford: all three branches must be robust and strong to advance the important work of government.

We urge you to take immediate action to avert a potential crisis and preserve the quality and vitality of the federal judiciary, and we offer the following suggestions:

1. The President and the Senate should make the prompt filling of federal judicial vacancies a priority. Each party to the process should commit sufficient time and resources to the endeavor, and resolve to work cooperatively and across the political aisle to reduce the vacancy rate as quickly as possible. A commitment should be made to cultivate a process that is dominated by common purpose and a spirit of mutual respect and bipartisan cooperation.

Politics and bipartisanship are not mutually exclusive. Even though the judicial nomination and confirmation process is political by design and gives each branch an opportunity to exercise a check on the quality of the federal bench, it should not serve as a battleground for other political disputes. A renewed spirit of bipartisanship is essential to reducing the backlog of vacancies and improving the process.

2. The Administration should make a concerted effort to shorten the time between vacancy and nomination and to submit a nomination to the Senate for every outstanding Article III judicial vacancy. The Administration should make a special effort to act with due diligence to nominate individuals to the vacant judicial seats that the Administrative Office of the United States Courts has classified as “judicial emergencies” (42 now exist), based on a combination of the length of time the seat has been vacant and the number of weighted or adjusted case filings for that seat.

We commend the Administration for its commitment to engage in meaningful prenomination consultation with home-state senators, a concept that the ABA endorsed in 2007 as a means to reduce partisanship. As a result, many nominations have had the backing of both home-state senators, regardless of party affiliation. Unfortunately, even though prenomination consultation has increased bipartisan accord during the initial phases of the process, it has not insulated nominees from partisan politics on the Senate floor: senators have blocked or delayed the consideration of numerous nominees who have the support of their home-state senators as well as the overwhelming support of the Senate Judiciary Committee.

3. The Senate should give every nominee an up-or-down vote within a reasonable time after the nomination is reported by the Senate Judiciary Committee.

Dilatory tactics have been used repeatedly to stall Senate floor consideration of judicial nominees, starting with the first nomination to reach the floor for a vote. Even though the Senate has confirmed 25 nominees this session, the Senate Judiciary Committee has reported out nominees far faster than the Senate has scheduled votes. As a result, the backlog of nominees awaiting floor action has steadily increased over the course of the session.

Twelve of the 21 nominees currently awaiting floor consideration were approved by unanimous consent, unanimous vote, or voice vote of the committee; two were approved with little dissent, and only seven received significant opposition. That almost two-thirds of them had no or little opposition in committee, combined with the fact that many prior nominees subjected to delayed floor consideration ultimately were confirmed by unanimous or almost unanimous vote, strongly suggests that the failure to schedule timely floor votes on many pending nominees has little or nothing to do with their qualifications.

Tactics to delay votes on nominees that are launched for reasons not associated with their qualifications blatantly inject politics into the process. Such tactics waste the time of the Senate and increase the time a nominee is in limbo. Worst of all, they needlessly deprive the federal courts of the judges they sorely need.

Senate leaders should seek to avoid scheduling delays over nominees who have bipartisan support and should discourage and dissuade their colleagues from using the judicial confirmation process to advance or defeat other legislative objectives. If legitimate concerns are raised over a nominee's qualifications for a lifetime appointment to the federal bench, sufficient time should be scheduled to permit the Senate to engage in full debate. The objective should not be to rush consideration of nominees whose qualifications are questioned, but to assure timely consideration of every judicial nominee whose nomination has been approved by the Senate Judiciary Committee and forwarded to the Senate for a confirmation vote.

We urge all members of the Senate to remain cognizant of the central importance of a fully staffed federal judiciary and to make an effort to reach across the aisle to try to find constructive ways to support the judiciary and protect it from excessive political zeal. We believe that a true respect for the importance of the federal courts will best inform each senator's decision with regard to action on pending judicial nominations.

Our judicial system is predicated on the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly, and that justice delayed is justice denied. There may be disagreements with individual decisions rendered by the federal courts, but few would dispute their essential role in our system of government and their impact on daily life. Congress should take action to support, not undermine, the vital work of the federal courts.

We urge the President and the Senate to take all necessary steps to fill existing vacancies promptly and to restore bipartisan accord to the nomination and confirmation process so that the federal courts will not be deprived of the judges they need to do their important work.

Sincerely,

A handwritten signature in cursive script that reads "Carolyn B. Lamm". The signature is written in black ink and is positioned below the word "Sincerely,".

Carolyn B. Lamm
President