JUDICIAL VACANCIES: 114th Congress Wrap-Up

114th Congress Charts

- Summary of Vacancies, Nominations, and Confirmations. This ABA chart provides a numerical summary of all vacancies, nominations and confirmations during the 114th Congress.
- Detailed Chart of Senate Action on Nominees. This ABA chart provides the status of each nominee's progress through each step of the confirmation process during the 114th Congress.
- Confirmations by the Month during the 114th Congress. This ABA chart provides a visual snapshot of the pace of confirmations.

First Session

When the 114th Congress convened on January 6, Senators returned to a chamber controlled by Republicans (54 Republicans, 44 Democrats, and 2 Independents who caucus with the Democrats) and a Senate Judiciary Committee chaired by Senator Grassley, a non-lawyer.

Senator Grassley outlined his approach to judicial confirmations in his home state papers soon after the Midterm Elections. He said that the Senate Judiciary Committee “should not be a rubber stamp for the president.” He stated: “Factors I consider important include intellectual ability, respect for the Constitution, fidelity to the law, personal integrity, appropriate judicial temperament, and professional competence. Judges are to decide cases and controversies —not establish public policy or make law.”

During the first three months of the session, the Senate failed to hold any confirmation votes, even though five of the six pending nominees were slated to fill judicial vacancies in Utah and Texas, states with two Republican Senators. The lack of action and concern over the growing backlog of civil lawsuits prompted the Wall Street Journal to run a cover story about it on April 7, 2015.

The first confirmation occurred on April 13, when Alfred Bennett, originally nominated in the 113th Congress (September 2014) to the District Court of the Southern District of Texas, was confirmed by a vote of 95-0. During the rest of the Session only nine additional district court judges and one appellate court judge were confirmed. Excessive delays followed by unanimous confirmation votes all session confirmed concerns that Senate Majority Leader McConnell had decided to slow-walk the process this Congress, not because of concerns over the qualifications of the nominees, but because of outrage over the filibuster rules change foisted on Republicans during the prior Congress when the Democrats were in control of the Senate. (*See Historical Note, below, for additional information on the filibuster rule change.)

In December 2015, ABA president Paulette Brown wrote Senate leaders urging them to put the needs of the courts first and confirm of nominees pending on the floor prior to adjournment of the 1st Session. While the Senate confirmed only one additional nominee in December, Senate leaders did make modest
concession, agreeing to not return pending nominees and to vote on five specified nominees early in the next session.

In sum, there were 45 vacancies at the start the 1st Session and 66 vacancies at adjournment. During the Session, President Obama made 42 nominations (12 of whom were renominated from the previous Congress), and the Senate confirmed 11 nominees – 10 to the district courts and one to the Court of Appeals for the Federal Circuit.

Second Session

Unexpected Supreme Court Vacancy
On February 13, 2016, Justice Antonin Scalia died unexpectedly. Within hours, Senate Majority Leader McConnell issued a short statement that concluded by stating: “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.”

This unleashed a torrent of partisan debate and comments from pundits, academics, editorial boards, organizations, past government officials and other Members of Congress. Senator Grassley at first appeared to waver over how the Senate Judiciary Committee would proceed, but he quickly fell in step with the Majority Leader as evidenced by his letter that was cosigned by all of his Republican colleagues on the Committee and sent to the Majority Leader on February 15. It stated in part:

Given the particular circumstances under which this vacancy arises, we wish to inform you of our intention to exercise our constitutional authority to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia’s vacancy. Because our decision is based on constitutional principle and born of a necessity to protect the will of the American people, this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017. In response, Democrats on the Committee sent a joint letter urging Grassley to reconsider his position.

A few days later, an opinion piece in the Washington Post that was jointly signed by Senator Grassley and the Majority Leader further solidified their stance and advanced arguments that became talking points that Republicans have used consistently to justify their refusal to take any action on the Garland nomination during this Congress. Their opinion piece concludes by stating, “It is today the American people, rather than a lame-duck president whose priorities and policies they just rejected in the most-recent national election, who should be afforded the opportunity to replace Justice Scalia.” This statement clearly is not supported by the U. S. Constitution.

President Obama Makes Supreme Court Nomination
On March 16, President Obama nominated Merrick Garland, Chief Judge of the U.S. Court of Appeals for the District of Columbia to be associate justice of the U.S. Supreme Court. Judge Garland was confirmed to the DC Circuit Court on a vote of 76-23 in 1997 and has served as its Chief Judge since February 2013. The ABA’s Standing Committee on the Federal Judiciary, which evaluates and rates the professional qualifications of nominees to the Article III and Article IV federal courts at the request of the administration, released its rating (and written statement) of Judge Garland on June 21. The Standing Committee concluded: “Merrick Garland is a preeminent member of the legal profession with outstanding legal ability and exceptional breadth of experience. He meets the very highest standards of integrity, professional competence and judicial temperament. It is the unanimous opinion of Standing Committee that Judge Garland is “Well Qualified” to serve as Associate Justice of the Supreme Court of the United States.”
Congressional Response to the Garland Nomination

Even though there is no doubt that Judge Garland commands the respect of Democrats and Republicans alike, Senate Republican leadership has refused to discuss the nominee’s eminent qualifications, instead keeping the focus on why they do not intend — and do not think they have an obligation -- to take action. The vast majority of Republican senators are speaking from these same talking points. Only a handful have departed from the party line and publicly stated that Judge Garland should at least receive a confirmation hearing.

Activity on Lower Court Nominees

During the first two months of the 2nd Session, Senate leaders adhered to the agreement worked out at the end of the 1st Session, allowing up-or-down votes on five nominees, including Luis Felipe Restrepo to the Third Circuit, prior to the Presidents’ Day recess. All five were confirmed with overwhelming votes of support.

After the death of Justice Scalia, Senate activity on nominees came to a halt for almost two months. The Senate Judiciary Committee started back to work on April 7, when it reported three nominees to the Senate by unanimous voice vote, and the Senate finally took action on April 11, when Waverly Crenshaw Jr., whose nomination to the District Court for the Middle District of Tennessee had been pending on the floor for nine months, was confirmed by a vote of 92-0.

The Senate Majority Leader continued to slow-walk confirmation votes for the remaining months prior to the summer recess. Only one nominee was confirmed in May, three in June, and one in July. The Senate left town on July 25 for seven weeks without voting on the 22 nominees pending on the floor.

There is a widespread, and mostly incorrect, belief that a slowdown in judicial confirmations is to be expected in the last half of a presidential election year, a phenomenon dubbed the Thurmond Rule. However, confirmation activity in prior election years demonstrates that there is no pattern to when or how the Rule operates other than that it is invoked at the will of the Majority Leader and chair of Senate Judiciary Committee, and primarily results in a slow-down or cessation of circuit court confirmations. The Thurmond Rule fails to adequately explain McConnell’s insistence on slow-walking even the uncontroversial district court nominees supported by their home-state Republican senators.

The Senate returned on September 6 and recessed on September 29 for the elections. During the three weeks in session, the Senate Judiciary Committee reported three nominees to the Senate, but the Majority Leader refused to schedule any confirmation votes despite mounting pressure and criticism from even some Republican colleagues.

Lame Duck Session

With the election ushering in an era of unified Republican control of the political branches, hopes for action on the Garland nomination or confirmation votes on the nominees pending on the Senate floor were dashed, and no further action on filling judicial vacancies occurred for the rest of the Session.

Final Statistics for the 114th Congress

The 114th Congress convened with 45 vacancies and adjourned with 101. The Administrative Office of the U.S. Courts declared 38 of those vacancies judicial emergencies. President Obama made 76 nominations during the 114th Congress and 22 were confirmed and 54 were returned at the end of the Congress. During his eight years in office, President Obama appointed 329 individuals to the Article III bench.
JUDICIAL VACANCIES: 113TH CONGRESS OVERVIEW

Significant Events and Issues

Vacancies at Start of 113th Congress

On January 3, 2013, the day that the 112th Congress adjourned sine die and the 113th Congress convened, there were 77 vacancies on Article III courts. President Obama immediately renominated the 33 nominees pending at adjournment, including two who had been successfully filibustered and 11 who were waiting for a final floor vote.

1st Session Begins with Procedural Reforms and Modest Progress

On January 24, 2013, Senate leaders agreed to a modest packet of reforms to Senate procedures and rules, including limiting the time for post-cloture debate on district court nominations to two hours for the duration of the 113th Congress. Senator Reid said he hoped this modest change would discourage senators from filibustering district court nominees, a record number of whom were filibustered during the 112th Congress. The two leaders also agreed that senators who wish to object or threaten a filibuster must actually come to the floor to do so, and that debate time post-cloture must be used for debate and not as a tactic to slow down business.

This marked the second time during the Obama presidency that the Majority and Minority Leaders agreed to modest procedural changes: at the start of the 112th Congress, they agreed to restrict the use of secret holds, long considered a senatorial privilege, by requiring any senator who places a holds to disclose his or her identity within two days.

The first judicial nominees of the 113th Congress were confirmed in mid-February. William Kayatta, who had waited 10 months for a floor vote, was confirmed to a seat on the First Circuit, by a vote of 88-12; Robert Bacharach, whose nomination had been filibustered last Congress, was confirmed by a 93-0 vote to the Tenth Circuit; and Richard Tarranto, who had waited for a floor vote for a year, was confirmed to the Federal Circuit by a vote of 91-0.

Skirmishes over the DC Circuit

At the start of the 113th Congress, President Obama renominated Caitlin Halligan and Sri Srinvasan to two of the four vacant seats on the D.C. Circuit. During the 112th Congress, Halligan’s nomination had been successfully filibustered, and Srinivasan’s nomination received no action for six months to
accommodate Senate Judiciary Committee Republicans who wanted more information about his activities at the Department of Justice.

The comity enjoyed during the first few months of the 113th Congress was not sufficient to overcome Republican opposition to Caitlin Halligan. For the second time in two years, her nomination was successfully filibustered, this time on a cloture vote of 51-41. Halligan withdrew her nomination on March 25, 2013, a few weeks after the vote. Sri Srinivasan fared better. Even though Senator Reid had to force a floor vote by filing a cloture petition, Sri Srinivasan was confirmed to the DC Circuit by a vote of 97-0 on May 23, 2013.

To discourage any further nominations to the D.C. Circuit by President Obama, Senator Grassley (R-IA) introduced S. 699, the Court Efficiency Act of 2013, which would reduce from 11 to 8 the number of authorized judgeships on the court and create two new judgeships in other circuits. It would take effect immediately upon enactment. Upon introduction, Senator Grassley stated, “It is no secret that the D.C. Circuit is the least-busy, least-worked appellate court in the nation.” His assessment of the needs of the court was based on his interpretation of statistics maintained by the Judicial Conference.

Opponents of Grassley’s bill point out that the statistics he relies on do not take into account the complexity of the cases before the D.C. Circuit. As retired D.C. Circuit Court Judge Pat Wald stated in an op-ed in the Washington Post, “the D.C. Circuit has exclusive jurisdiction over many vital national security challenges and hears the bulk of appeals from the major regulatory agencies of the federal government,” including clean air and water regulations, nuclear plant safety, health care reform, insider trading and more. She also said it resolves more constitutional questions involving separation of powers and executive prerogatives than any other court of appeals, and is often the “breeding ground” for Supreme Court nominees and referred to as the second most important court in the nation. Neither the Judicial Conference nor the D.C. Circuit has recommended this reduction in judgeships for the D.C. Circuit. In 2009, the Judicial Conference, which utilizes a multi-step process for developing comprehensive recommendations for terminating and authorizing judgeships, recommended elimination of the D.C. Circuit’s 12th judgeship. Congress readily concurred and passed legislation that offset the reduction on the D.C. Circuit by adding one authorized judgeship to the Ninth Circuit Court of Appeals. No other reductions have been proposed.

On June 4, President Obama exercised his constitutional duty to make nominations to vacancies on the federal bench by submitting to the Senate the names of three nominees to the D.C. Circuit - Patricia Ann Millett, Cornelia T. L. Pillard, and Robert L. Wilkins. Republicans immediately and vociferously denounced the action, accusing the President of “court-packing” and suggesting that the President’s motive to fill the open seats was strictly political.

The Senate Judiciary Committee reported all three nominees to the Senate on party-line votes of 10-8. However, during the fall, floor consideration of the nomination of Patricia Ann Millett was blocked by a cloture vote of 55-38-3; the nomination of T. L. Pillard by a cloture vote of 56-41; and the nomination of Robert Wilkins by a cloture vote of 55-43.

**Majority Leader Invokes the “Nuclear Option” to Change the Filibuster Rule**

On November 21, 2013, Majority Leader Reid invoked the “nuclear option” to change the Senate rules regarding filibusters by resorting to a series of procedural moves that enabled a change in the standing Senate rules by simple majority vote rather than the normally required supermajority of 67 votes.
Members of both parties had threatened to invoke the nuclear option for almost a decade but always worked out some accord to avert it at the last minute. For example, in 2005, then-Majority Leader Bill Frist threatened to invoke it after Democrats filibustered ten of President Bush’s appointees for appellate court nominees, including Miguel Estrada. The Gang of 14—seven senators from each party—reached an accord over the nominees and issued a memorandum of understanding to limit filibusters to extraordinary circumstances. In the intervening years, both parties have violated the agreement in one way or another, and increasing discord over the nomination and confirmation process culminated in Majority Leader Reid pulling the trigger. He claimed it was necessary because of widespread Republican abuse of the filibuster, an assertion he defends by citing a June 2013 Congressional Research Service report that concluded that 82 of the 168 filibusters of nominations in the history of the United States had been waged by Republicans under President Obama. In addition, the report stated that 20 of the 23 filibusters of district court nominees to occur in the history of our country were launched against Obama’s district court nominees.

The new rule change guts the power of the filibuster by lowering the threshold for cloture on all executive branch and judicial nominees except for Supreme Court nominees from 60 votes to a simple majority. The change applies to all future congresses and presidents, barring a future rule change by the Senate.

Shortly after the rule change, the Senate reconsidered the nominations of Millet, Pillard, and Wilkins, the three D.C. Circuit nominees who had been filibustered earlier in the session. In a symbolic gesture, all three were filibustered again, but the new rule guaranteed successful cloture votes, and all three went on to be confirmed - Millet by a vote of 56-38; Pillard by a vote of 51-44; and Wilkins by a vote of 55-43.

The Senate rule change in no way assures the prompt filling of judicial vacancies; there still are a number of ways for senators to delay the nomination and confirmation process, including not forwarding names of candidates for nomination to district court vacancies; refusing or delaying the return of blue slips (e.g., consider the delay by the two Republican senators in returning blue slips for five Arizona nominees or the blocking of blue slips for sixth Circuit nominees by two Democratic senators in 2002); blocking executive committee action by preventing a quorum from being present; placing a series of holds on a nominee; and, of course, using up precious Senate time by filibustering nominees, thereby setting in motion cloture procedures that permit up to 30 hours of debate on circuit court nominees and 2 hours on district court nominees.

Following invocation of the nuclear option, Republicans closed down the confirmation process for the rest of the session by refusing to attend executive business meetings or vote on consensus nominees previously scheduled for a floor vote. In an act of further protest, Republicans returned 55 of the 56 pending nominees at the close of the 1st Session. (The Wilkens nomination was not returned because a cloture petition was pending on his nomination at the time of adjournment.)

2nd Session of Congress: Pre-Midterm Elections

Ninety-five vacancies existed at the start of the 2nd Session, resulting in a vacancy rate of 11 percent. President Obama immediately renominated 54 of the 55 returned nominees, nine of whom were waiting for a floor vote when the 1st Session adjourned. The White House did not renominate Judge William Thomas to a district court seat because of opposition from Senator Marco Rubio (R-FL).

Even though Republicans demanded a cloture vote on every nominee brought to the floor for a vote, they did not use all the available tools in their arsenal to obstruct the confirmation process. As a result, by the time Congress recessed for the mid-term elections in September, the Senate had confirmed 62 nominees, 12 for seats on the courts of appeals. Some of the nominees had been voted out of committee on a strictly
party-line vote and would not have gotten a floor vote, absent the rule change. By the time the Senate recessed for the mid-term elections on September 19, the vacancy rate had dropped to seven percent.

Not all courts benefitted from the reduced vacancy rate. For example, at recess time, the district courts in Pennsylvania and Texas had a total of 17 vacancies; even though nominees for nine of those vacancies were pending in committee, further action had been delayed because of nomination skirmishes. Similarly, disagreement over a Georgia district court nominee, who was nominated as part of a package deal, prevented timely confirmation votes on several other Georgia nominees pending on the floor all session, including Jill Pryor. Originally nominated to the Eleventh Circuit in January 2013, she was finally given a floor vote this past June and was confirmed by a vote of 97-0.

**Midterm Elections**

Senators returned to work on November 12 to a changed dynamic. With Republicans in control of the Senate next Congress, Mitch McConnell will be Majority Leader and Harry Reid will be Minority Leader. [Senator Grassley](#) will chair the Senate Judiciary Committee and Senator Leahy will assume the position of Ranking Member. There will be additional changes to the committee roster, but assignments likely will not be announced until the start of the new Congress.

There is much speculation over how a Republican Senate will handle the nomination and confirmation process next Congress. While Republicans cannot stop action on President Obama’s nominees during the remainder of this Congress, next Congress they could reject to work with President Obama to identify potential nominees for district court vacancies or block action on nominees pending in committee or on the floor. It also is unclear how the administration will respond to the new dynamic. While partisanship and delay is likely to increase, neither history nor self-interest suggests a complete breakdown of the nomination process. Approximately three dozen of the current and announced future vacancies exist in states with two Republican senators, and a dozen of those vacancies have been declared judicial emergencies due to a combination of the duration of the vacancy and excessive workload of the court.

**Lame Duck Session**

As soon as the Senate reconvened on November 17, the administration and Senators Leahy and Reid demonstrated their intention to schedule action on as many pending nominees as possible before adjournment: in the first week of the lame duck session, the President submitted three new nominations, the Senate Judiciary Committee reported out nine, and the Senate confirmed eight judges.

On December 13, [Senator Grassley](#) expressed his opposition to voting on nominees who had been reported out of committee during the lame duck session. His objection was noted, but not heeded.

On December 16, prior to adjourning sine die, the Senate quickly confirmed 12 district court nominees, 11 by voice vote, and likely set new records for the highest number of nominees voted on in one day and adjourning sine die with only one nominee pending on the floor. (Thirteen additional nominees were pending in committee at adjournment.) The change to the filibuster rule last November set the stage for this remarkable event, but the delay over passing the final appropriations bill for FY 2015 gave the Majority Leader the time he needed to file cloture and schedule these final confirmation votes. Among the judges confirmed on the last day of the 113th Congress were Robert Pitman to a seat on the District Court for the Western District of Texas that had remained vacant for more than six years, and Amos Massant and Robert Schroeder for district court seats in the Eastern District of Texas.

In total, 27 judges were confirmed during the lame duck session.
Final Statistics for the 113\textsuperscript{th} Congress

During the 113\textsuperscript{th} Congress, President Obama made 152 nominations and Congress confirmed 134: 23 to the courts of appeals, 109 to the district courts, and two to the Court of International Trade. Three nominations were withdrawn (including one nomination that could not overcome a filibuster), and 14 nominations were returned to the President when Congress adjourned \textit{sine die}.

- **1\textsuperscript{st} Session Summary:** The 1\textsuperscript{st} Session started with 77 judicial vacancies and adjourned with 94 vacancies. Forty-five judges were confirmed: 34 to the district courts and 11 to the courts of appeals. Congress returned 55 of the 56 pending nominations. Robert Leon Wilkins’ nomination was not returned.

- **2\textsuperscript{nd} Session Summary:** President Obama renominated all of the returned nominees except William L. Thomas (USDC: S.D. FL). The 2\textsuperscript{nd} Session started with 92 vacancies and ended with 41 vacancies, reducing the vacancy rate to 5%. Eighty-nine judges were confirmed during the session, 12 for vacancies on the courts of appeals.