

SO MANY SEATS TO FILL

THE FUTURE OF THE FEDERAL JUDICIARY

James Marion

When it comes to matters of the federal bench, the Supreme Court tends to hog the spotlight. Indeed, the recent confirmation of Neil Gorsuch to the nation's highest court saw the culmination of a yearlong saga, with right and left battling since February 2016 to fill the seat of the late Associate Justice Antonin Scalia.

In that time, we have seen the unprecedented Senate Republican stonewalling of President Barack Obama nominee Merrick Garland, the shocking upset electoral victory of Donald Trump, the subsequent nomination of Judge Gorsuch that resulted in a Democratic filibuster, and the so-called “nuclear option” rule change used by Republicans to circumvent that filibuster and ultimately upend the Supreme Court confirmation process for the foreseeable future.

Not since Franklin D. Roosevelt's infamous 1937 “court-packing” proposal have we seen a year so fraught with judicial politics . . . and it looks like the story is just getting started.

With all the high-stakes drama that comes with confirmations and landmark decisions, it can be easy to forget that the Supreme Court is only the tip of the judiciary iceberg. While the issue has largely gone uncovered by mainstream media, the situation facing the other 881 federal judgeships is perhaps even more critical.

THE LOWER COURT'S BURDEN

Federal judges are appointed by the president and confirmed by the Senate pursuant to the appointments clause in Article II of the US Constitution. These individuals are the embodiment of the power vested in the judicial branch in Article III, and, as such, they are typically referred to as Article III judges. This group includes the nine justices of the Supreme Court of the United States (SCOTUS), the thirteen circuit courts of appeals, which comprise 179 seats, and the ninety-four district (and territorial) courts with their 677 seats. The remaining federal judgeships are found on the less well-known US Court of International Trade and the US Court of Federal Claims. With the exception of the federal claims court, all federal judges are appointed for life terms.

Within this breakdown, the circuit appellate judges, but particularly the solitary district court judges, field the lion's share of federal cases, a workload that Chief Justice John Roberts has called "daunting." The typical federal judge has upwards of 500 cases on their docket. In the fiscal year that ended last September, the district courts saw 369,000 new filings, reflecting a 38 percent increase in overall caseload since 1990—the last time Congress passed comprehensive legislation to expand the number of judgeships. Comparatively, over that same twenty-seven-year period, new judgeships have only increased by 4 percent.

Given the depth of knowledge, patience, and insight required to process and adjudicate each complex federal claim, it would be fair to say that our federal judges are swamped. For certain courts, the resulting backlog has reached dire levels. At the time of this writing, a total of forty-eight "ju-

dicial emergencies" had been declared within the federal system, with at least four districts (including the Eastern District of California) identified as requiring urgent relief.

The Federal Bar Association has been pushing Congress to address the crisis, citing the inability to deliver judgments expeditiously and the associated costs transposed to litigants as a result. Furthermore, they note that given the growing number of criminal defendants being tried in federal court—an increase of 33 percent since 2003—the Sixth Amendment right to speedy trial is in jeopardy.

While judicial emergencies are in part defined by a particular court's excess of adjusted filings (upwards of 700 per panel for the appellate courts, or 600 per judgeship at the district level), stressing the need for more judgeships overall, they are also largely the result of copious vacancies in seats that already exist. With the number of vacancies almost certain to increase, the effort to fill them could become a referendum not only on the character and functionality of the judiciary, but on our entire governing system.

POTENTIAL FOR HISTORIC VACANCIES

With his first SCOTUS appointment now in the rearview, President Trump and his team can now set their sights on a long list of judges needed to occupy the roughly 12 percent of lower court seats currently sitting empty. That number, while not the highest in recent history (Bill Clinton entered the White House with 14 percent of judgeships unfilled), is still double what Barack Obama faced in 2009.

The discrepancy is due in some part to the obstructionist tactics employed by Senate Republicans throughout Obama's two terms, but especially in his final two years in office, where the ability to delay confirmation afforded opportunity to run out the clock on the administration. This political gamble paid off handsomely, much to the chagrin of frustrated Democrats. Merrick Garland was of course the most conspicuous casualty of the confirmation blocking, but the gambit also wreaked havoc on the lower courts, a

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local example being Obama’s nomination of District Court Judge for the Northern District of California, Lucy Koh, to fill the seat left vacant by Ninth Circuit Appellate Judge Harry Pregerson. Though Koh was nominated in February of 2016, her nomination slowly withered on the congressional vine, and eventually expired just after the new year. By Inauguration Day, 112 vacancies existed on the federal bench and 33 of those vacancies had existed for more than two years.

Despite the uphill battle to confirm his judicial nominees, Obama still managed to appoint nearly 40 percent of the federal bench before leaving office, helped in large part by the Senate Democrats’ own 2013 dalliance with “nuclear” maneuvering, which eliminated the filibuster during approval votes for the lower courts, meaning judges could now be confirmed with a simple majority vote. Through these successful appointments, Obama accomplished an unprecedented diversification of the federal courts, seating more female, minority, and openly gay or lesbian judges than any president before him. For the first time ever, white male judges, a group that historically dominated the courts’ demographics, fell out of the active majority.

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A number of federal judges are above the age of seventy. Moreover, while federal judges are appointed for life, with a certain combination of age and years served they become eligible to elect “senior status,” whereby they enter a form of semiretirement and are replaceable. If, in concert with nature, all eligible judges elect senior status during his term, Trump could ultimately appoint over half of the federal bench.

Lost below the din of flashier headlines, Trump made his first lower court nomination in late March by selecting District Judge Amul Thapar to fill a spot on the Sixth Circuit Court of Appeals. If Judge Gorsuch and Judge Thapar are an accurate barometer of picks to follow, it would appear Trump largely favors a pool of candidates in the Scalia mold, curated by leaders of conservative law organizations like the Federalist Society, the Heritage Foundation, and the Judicial Crisis Network, not to mention the super PACs that supply it with anonymous donor dollars. The question remains as to what priority the new administration will assign to pushing through its nominees speedily and to what extent it can negotiate Democrats’ efforts to slow them down.

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