



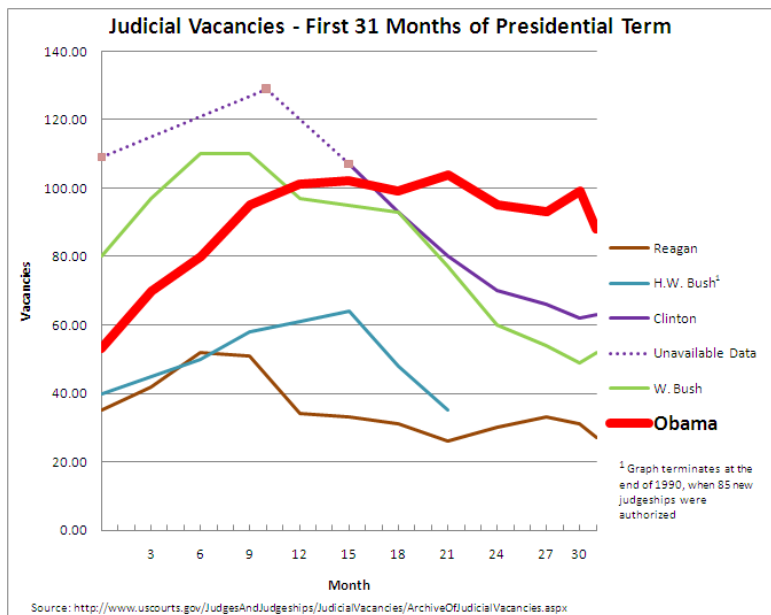
August 4, 2011

## Will the Slow Pace of Judicial Confirmations Make 80 Vacancies the New Normal?

At a time when caseloads in our federal courts are at a record high the Senate’s confirmation process for judicial nominees has failed to keep pace with new judicial vacancies. This has stretched the federal judiciary, already overextended, close to its breaking point. While the number of judicial vacancies typically increases at the beginning of a new presidency, a rapid decline usually follows. The Obama Presidency has seen that trend broken. Never before has the number of vacancies risen so sharply and remained so high for so long during a President’s term. **For 764 straight days there have been more than 80 vacancies on the federal bench, and there is no end in sight.** The only other time the number of judicial vacancies has stood above 80 for so long was a completely anomalous period after Congress established 85 new judgeships in 1990.

This judicial vacancy crisis has led even prominent conservative judges to speak out. [Chief Justice John Roberts](#) made the vacancy crisis an issue in his 2010 annual report; [Justice Anthony Kennedy](#) focused on it in his August 2010 address to the Ninth Circuit Judicial Conference; Ninth Circuit [Chief Judge Alex Kozinski](#) and nineteen other judges wrote to the Senate in November 2010 on behalf of the Ninth Circuit Judicial Council regarding the “desperate need” for new judges; and, tragically, [U.S. District Judge John Roll](#) was visiting with U.S. Rep. Gabrielle Giffords about the federal judicial vacancy crisis when they were shot, and he was killed, in January.

**The slow pace of judicial confirmations in the Senate has seen the number of judicial vacancies explode from 55 when President Obama took office to 88 today.<sup>1</sup> Furthermore, an additional 23 future vacancies are already announced, at least five of which will occur in August 2011.** Such a high number of vacancies so far into a President’s term is unprecedented. At this time during George W. Bush’s presidency, the number of vacancies had been reduced to 52, even though he entered office with 80 vacancies. Similarly, at this time during Bill Clinton’s presidency, there were only 63 vacancies, even though he encountered 109 when he first took office.



During President Obama’s first two years in office, the Senate confirmed only 62 judicial nominees. In contrast, during President George W. Bush’s first two years in office, the Senate confirmed 100 judges. Overall, the Senate has confirmed 95 Obama Article III judicial nominees over the first 925 days of his presidency, an average rate of 3.1 confirmations per month. By contrast, during the first term of the Bush

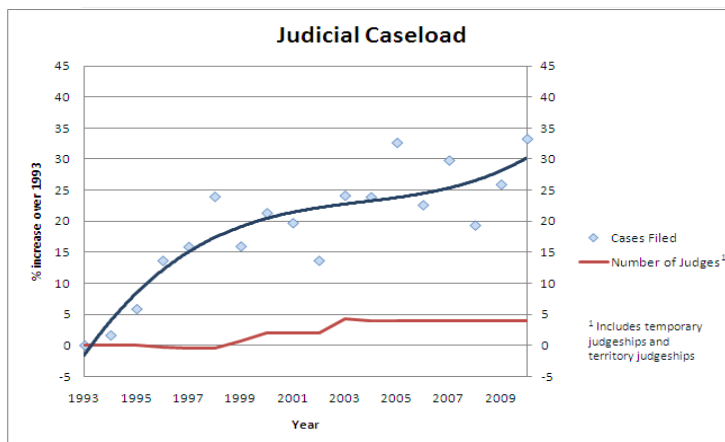
<sup>1</sup> Our numbers include only Article III judgeships, not federal judgeships in U.S. territories created by Congress that lack life tenure.

Presidency, the Senate confirmed an average of 4.2 judges per month. **The slow pace of judicial confirmations in the Senate during the Obama presidency has so far failed to keep pace with even the historic rate of new judicial vacancies.** During the sixteen years spanning the Clinton and Bush presidencies there were 610 new judicial vacancies, for an average of 3.2 new judicial vacancies a month, 38 a year, and 152 vacancies every four years. Confirmations in the Obama Presidency are not even keeping up with historical levels of attrition.<sup>2</sup>

Unless there is a significant increase in the pace of judicial confirmations in the Senate, the number of overall judicial vacancies is unlikely to dip below 80 any time soon. If, as election season draws nearer, the Senate confirmation process slows further, or shuts down at some point in 2012, the number of vacancies will probably stay above 80 at least through the end of President Obama's first term. **With 35 of the 88 current vacancies declared "[judicial emergencies](#)" by the federal judiciary itself, having more than 80 vacancies is simply unacceptable.** By way of comparison, when President George W. Bush entered his second term there were only 37 judicial vacancies, and the average over the course of his second term during any given month was 47, with a high of 59 vacancies.

The judicial vacancy crisis is adding new burdens to a court system already stretched thin. Only 35 new permanent judgeships have been authorized by Congress in the last 20 years, even as the federal caseload has expanded 33% from 312,512 cases in federal District and Circuit Courts in 1993 to 416,384 cases in 2010.<sup>3</sup> At the Circuit Court level, **the number of cases per Circuit judgeship has increased 17 percent**, from 290 cases per judge in 1993 to 340 cases per judge in 2010. **No new Circuit judgeships have been added since 1990**, despite an increase in the number of appellate cases from 48,474 in 1993 to 56,790 in 2010.

**At the District Court level the situation is even more strained, with the number of cases per judgeship increasing 30 percent** from 407 cases per judgeship in 1993 to 528 cases per judgeship in 2010. Over this same period, **only 35 new permanent District Court judgeships were added** (a 5.5 percent increase), even as the number of District Court cases expanded from 264,038 in 1993 to 359,594 in 2010 (a 36 percent increase).



The unprecedented nature of the vacancy crisis and the strain it is putting on the federal judiciary has not received nearly the amount of public attention it deserves. In some respects, **today's federal judiciary is beginning to resemble our armed forces deployed on multiple tours of duty**, with at least one trial court judge having to treat his overwhelming criminal and civil caseload like [traffic court](#), and with senior status judges – who handle about 20 percent of the federal workload – working well past the age of 80, 90, and even [100](#), just to [keep the system from breaking](#). Our federal judiciary, the heart of our Nation's system of justice, deserves better.

<sup>2</sup> As demonstrated in the graph above, it took the Senate 19 months to clear the "bubble" of new judicial vacancies that occurred when President George W. Bush took office, 15 months when President Bill Clinton took office, 22 months when President George H.W. Bush took office, and 14 months when President Ronald Reagan took office. Today, more than 30 months in, there are still 33 more judicial vacancies than when President Obama first took office.

<sup>3</sup> Federal judgeship and judicial caseload statistics are from UScourts.gov, the latter of which only goes back to 1993.