



Justice at Stake
c a m p a i g n

BRENNAN
CENTER
FOR JUSTICE

June 22, 2010

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 Bldg
Washington, D.C. 20510

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

The Honorable Patrick Leahy
Chair, Senate Judiciary Committee
433 Russell Senate Bldg
Washington, DC 20510

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

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

While the public's attention will be focused on the Supreme Court with the upcoming confirmation hearings for Supreme Court nominee Elena Kagan, we urge you to join together to tackle the growing issue of federal court vacancies, and the politicization of the nomination and confirmation process.

Justice at Stake is a national, bipartisan campaign working to keep our courts fair and impartial, and to educate the public and work for reforms to keep politics and special

interests out of the courtroom so that judges can do their job protecting our Constitution, our rights, and the rule of law. The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The American Judicature Society (AJS) is an independent, national, nonpartisan organization with the mission to secure and promote an independent and qualified judiciary and fair system of justice. We write to you today to urge you to join together to institute common sense reforms to protect the integrity of the federal courts, and the ability of the courts to function properly and provide justice.

As of June 15, 2010, there were 103 vacancies in the Article III judgeships, 40 of which are deemed “emergencies” by the Federal Courts. There are roughly 20 additional anticipated upcoming vacancies, according to the Administrative Office of the U.S. Courts. These vacancies in the federal courts place even greater caseloads on our already overburdened federal judiciary, and thus create potential barriers to access to justice.

We believe that every administration should make the nomination of judges to the federal bench a top priority, and should make every attempt to fill judicial vacancies expeditiously. We further believe that the Senate has the responsibility to act to confirm judicial nominees expeditiously and without needless delays. For too long, the process of nominating and confirming federal judges has been politicized by both parties, damaging the integrity of our justice system.

Justice at Stake, the Brennan Center for Justice, and the American Judicature Society respectfully offer the following recommendations to address the current vacancies in the federal courts:

1) The Obama Administration should pick up the pace of judicial nominations

The single most important factor in the continuing vacancy rate in the federal courts is the lack of nominees to the bench to date by the Obama Administration. According to research done by Russell Wheeler at the Brookings Institution, President Obama has nominated far fewer judges to the federal bench than did his predecessor George W. Bush at this point in his first term in office.

As of June 8, 2010, President Obama had nominated 52 judges to the district courts, and 20 judges to the circuit courts. At the same time in his presidency, President Bush had nominated 72 judges to the district courts, and 30 judges to the circuit courts. Perhaps even more striking is the current lag between vacancy and nomination. The average number of days between vacancy and nomination for district court judges under the Bush administration was 267, while it is 300 under the Obama administration. And while the average lag between vacancy and nomination for circuit court nominees under the Bush administration was 133 days, the lag for the Obama administration is nearly double that, at 224 days.

Justice at Stake, the Brennan Center, and the American Judicature Society urge the Obama Administration to significantly increase the pace of judicial nominations.

2) The Senate should abolish the use of secret holds for judicial nominees

President Obama's nominees have received Senate Judiciary hearings more quickly than their Bush administration counterparts, and have higher confirmation rates. Moreover, most of President Obama's nominees have been confirmed by unanimous vote. Yet the time between nomination and confirmation has been considerably higher for Obama nominees: 202 days versus 154 for Bush nominees, per Wheeler's study. And President Obama's nominees (both judicial and other) have languished for an average 100 days after being approved by the judiciary committee. The most likely reason? Secret holds.

Under the rules of the Senate, no motion to entertain consideration of a bill shall proceed "unless by unanimous consent." A Senator may privately tell her party leadership that she intends to object to a motion, and the motion will thereby be stalled, and the Senator may remain anonymous. In 2007, the rules were amended so that such holds would become public after six days. But our understanding is that Senators have found a way around this attempt to limit secret holds, by "tag-teaming" holds between two or more Senators.

Justice at Stake, the Brennan Center, and the American Judicature Society urge Senators to pledge to end this practice of holding up nominees anonymously. Where there is a legitimate basis to object to a nominee, a Senator should so state publicly. The use of secret holds on judicial nominees runs counter to interests of accountability and transparency, and has no apparent purpose but to delay confirmation of judges, thus impacting the operation of the courts.

3) The Senate should take an up or down vote on Elena Kagan's nomination to the Supreme Court, and not threaten the use of a filibuster to delay her confirmation

The Constitution provides that federal judges, including Supreme Court Justices, shall be nominated and appointed by the President with the "advice and consent" of the Senate. The custom of the Senate has been to not filibuster judicial nominees, and the use of filibuster in this context has been rare and largely unsuccessful.

Justice at Stake, the Brennan Center, and the American Judicature Society do not endorse individual candidates or judicial nominees. For the purpose of this letter, we do not take the position that the use of filibuster is never warranted under any circumstances, nor do we contend that the political ideology of a nominee is always irrelevant, or that Senators should always be precluded from voting against a nominee based on political ideology. But when a judicial nominee is qualified to serve and enjoys support from across the political spectrum, the Senate should not engage in tactics that serve only to delay and score political points, and should simply take an up or down vote on a nominee after hearings. Unjustified delaying tactics, practiced by both parties in the past, do not serve the courts or the Constitution.

We thank you for your consideration, and urge you to work across the aisle to address this threat to the federal courts, and to justice. Access to justice and the rule of law will be served by your leadership or harmed by further inaction.

Sincerely,

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