

# NATIONAL REVIEW

## Senate must shift judicial confirmations into high gear

Deroy Murdock

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“The Senate needs to get to work,” says Federalist Society Executive Vice President Leonard Leo. He is visibly thrilled that the Senate confirmed Neil Gorsuch to the U.S. Supreme Court — and rather swiftly. Alas, Leo warns, if the Senate’s pace of judicial confirmations remains glacial, it will threaten President Donald Trump’s other appointments to the bench.

“The President has about 131 vacancies to fill, with that number increasing every several weeks,” Leo explains at a recent reception for the Goldwater Institute’s American Freedom Network, an initiative to recruit and deploy attorneys to work pro-bono for pro-freedom causes. “The Senate Judiciary Committee won’t do more than one or two appellate-court confirmation hearings every couple of weeks. At that rate, these vacancies might not be filled until after Trump’s term has ended.”

On Trump’s watch, a grand total of two judicial nominees have been confirmed, including Gorsuch. If the Senate moves nominees like tectonic plates, this could affect designees as yet unnamed.

“President Trump can’t nominate people, only to see them hanging in the air for eight or nine months,” Leo says. “You can’t do that to people.”

These vacancies have triggered alarms.

Ballotpedia’s Federal Vacancy Warning System reports that eight different district courts are at least 40 percent empty. Two of the District of Delaware’s four federal judgeships are unfilled. Two of the Middle District of Alabama’s three positions are uninhabited.

Silent courtrooms record the unheard sounds of untried cases. The official federal Judicial Conference has declared what it calls “judicial emergencies” in 49 courts, where filings have piled to the rafters. In one Arizona federal trial court, cases average 1,177 per judge. A single U.S. court of appeals seat in Atlanta is sinking beneath 1,151 criminal and civil actions.

“Whether it’s empty federal district courtrooms or unfilled federal appellate court seats, the failure of the President to timely nominate or the Senate to timely consider and confirm qualified

nominees for those positions means that justice is delayed and often denied,” says Cato Institute Vice President for Legal Affairs Roger Pilon. “While Washington delays, nothing less than the rule of law is ultimately at stake.”

Washington’s delays often involve senators who impose “blue slips” on judicial nominees. Like a referee’s whistle, a blue slip stops an appointee cold. A senator might file a blue slip, if a judicial candidate is from his state, and he has not been consulted, or if he harbors serious ethical questions about a contender. Previous Judiciary Committee chairmen have weighed blue slips differently. Leo recalls that Sen. Patrick Leahy, D-Vt., treated blue slips like red lights. Nominees were stuck until senators withdrew their blue slips.

However, “Blue slips are not holy writ as an historical matter,” Leo says. They normally have enjoyed some deference, but not solely because a senator merely opposes a nominee’s philosophy. Such matters should be examined in hearings, debated on the Senate floor, and considered before a senator votes yea or nay. A blue slip typically has not been an endless time-out, with one senator objecting while judicial seats grow cold.

These vacancies are a big-league opening for President Trump.

“Not since President Bill Clinton has a President had the opportunity to fill so many vacancies in the federal courts at the start of his first term,” Ballotpedia observed. “Trump’s 108 inherited vacancies represent roughly one in every eight life-term judicial positions (12.41 percent).”

All the more reason for the Republican Senate to grow a sense of urgency on this issue, and many others.

“People don’t realize, this is a melting ice cube,” says Manhattan attorney Mark W. Smith, a leader in Gotham’s Federalist Society chapter. GOP control of Congress and the White House is not a given. It’s a finite resource subject to the scorching sands of time and the bleaching effects of rapidly evaporating political courage. “The Senate needs to stop sitting around and get moving.”