

**Ninth Circuit Judicial Conference
Maui, August 18, 2010
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[Prepared Text]**

It is wonderful to be with you today and to be returning to my legal roots. I began my legal career in San Francisco, after attending law school at the University of California in Berkeley.

I want to talk to you today about the process for confirming federal judges and to provide an interim report card on the confirmation process for President Obama's nominations to the federal district and circuit courts. Regrettably, my topic fits all too well with the theme of this year's Circuit Conference of "Stress on Justice: 2010 and Beyond."

In 1981-82, during President Reagan's first term, confirmation votes for lower court nominees happened on average about one month after nomination.¹ By the time of Bill Clinton's and George W. Bush's presidencies this time had grown to 6 months for district court nominees and 1 year for circuit court nominees.² And those numbers are just averages—confirmation votes for a number of the judges sitting here today took much longer.

The comparable numbers for the current Congress will continue to change until the Congress adjourns for the final time this fall, but so far it is fair to say that the confirmation machinery continues to function poorly.³ Just as an illustration, two candidates for positions on the Fourth Circuit were voted out of the Judiciary Committee in January with only a single dissenting vote between them. One was confirmed on August 5, just as the Senate adjourned for its August recess. For the other it is 287 days since nomination, and counting, with no floor vote in sight.

Delays are enormously consequential for nominees and the knowledge that the confirmation process is so arduous and contentious may be influencing the quality of persons willing to accept an appointment, but that is just a speculation. What is definitely not speculative is that the process is just not confirming enough judges. This is the single fact that affects Americans and the American system of justice the most. On this measure, the disparity between President Obama's first two years and prior presidents is vast, and there is no conceivable way the gap will be bridged in the limited time the 111th Congress has remaining. As of today, only 40 of President Obama's lower-court nominees have been confirmed. In contrast, at the end of President George W. Bush's first two years in office, 100 judges were confirmed.

This disparity is even more remarkable when one considers that President Obama has been working with favorable Senate majorities of 60, 59 and 58, while during President Bush's first two years the Senate was controlled by the opposition party, the Democrats. Yet even with that supposed institutional advantage, President Obama's nominees are being confirmed at a much lower rate than President Bush's were. These figures are fundamentally a testament to how effective a determined minority can be slowing down the confirmation machinery.

During President Bush's second two years, when Democrats were in the minority in the Senate, they were able to delay some nominees, especially a group of court of appeals nominees who became the subject of several filibusters. In the 111th Congress, the Republican minority has further honed the skills necessary to slow the process down, skillfully exploiting the rules and norms of the Senate to prevent all but a few nominations from receiving final votes.

There are basically two major hurdles for any nominee: the Senate Judiciary Committee and the Senate floor. Opposition from a Senate minority is more effective on the Senate floor than in Committee, because the staples of delay at the committee stage—blue slips from home state senators and various stalling tactics within the committee, can be overcome by a dedicated committee chair, as Senator Leahy has been. Consequently, most of President Obama's nominees are proceeding at a sensible pace through the Judiciary Committee. For instance, district court nominees receive hearings in 34 days versus 77 days for President Bush. I note, however, that the averages do not mean much to individuals like Magistrate Judge Leslie Kobayashi, who waited 85 days to receive a hearing on her nomination to the District of Hawaii, or to pending nominees to the Northern and Southern Districts of California who already have been waiting 90 days for a hearing that won't come for at least another month.

Once a nominee's name moves to the floor, additional hurdles remain to be negotiated, most notably anonymous holds and the dreaded filibuster. This is where President Obama's nominees have been trapped. His district judge nominees have remained on the Senate floor for 83 days before an up or down vote, compared to just 18 days for President Bush's. Again, that is an average—Magistrate Judge Kim Mueller, waiting to join the Eastern District of California and set to work on its weighted case load of 1089 filings per judgeship, has waited 104 days since being unanimously reported from Committee on May 6. Magistrate Judge Ed Chen has been waiting 294 days. His nomination was returned to the White House when the Senate adjourned two weeks ago. The President intends to renominate him.

Stalling tactics on the floor are difficult to overcome—even when the majority party has nearly 60 votes—because it takes time to overcome them, and floor time is the scarcest commodity in the U.S. Senate. The culprit here is Senate Rule XIX. That Rule provides that any Senator seeking recognition to speak must be recognized and permitted to speak for as long as he or she wishes and is able to stand. Rule XIX is the rule that makes the filibuster possible, and it generates a scheduling nightmare for the Majority Leader. Imagine trying to schedule proceedings in your courtrooms if there were one hundred people who had a right to speak for as long as he or she wished on each and every motion or argument. Imagine further that you lacked the authority to rule any utterance irrelevant or redundant or prejudicial, and that you never knew before you started any proceeding just how many of the one hundred would exercise his or her rights and for how long.

The Senate Majority Leader deals with this scheduling nightmare by seeking unanimous consent to move forward. For decades the traditional procedural mechanism for Senate confirmation of judicial nominees has been unanimous consent—that is, all 100 Senators agreeing to confirm a judge. Across our history most judges—and almost all district judges—have been confirmed this way, often within a handful of days of being reported from the Committee. Now, however, there is an elaborate mechanism known as the Hotline, managed by the Democratic and Republican floor staff, by which the Senate leadership seeks to ensure agreement before moving to unanimous consent on the floor. If a Senator wishes to place an anonymous hold, she or he does so simply by notifying the party secretary and a Senator from each party will always be on the Floor to enforce such an objection when necessary.

Today, the Majority Leader has initially been denied unanimous consent to proceed for virtually every one of President Obama's nominees. Typically objections are being lodged that are not personal to individual nominees, and are unrelated to the merits of the nominee's qualifications. They seem to be attempts to throw sand in the works.⁴ Some will say that the Democrats went first, when they filibustered some of President Bush's court of appeals nominees at the end of his first term. But those filibusters were based on individualized objections specific to those nominees, objections that resulted in a significant number of "No" votes when votes were finally held. Today, many nominees have been held up for months only to have literally no opposition when they finally receive an up or down vote. Even though district court judges are been held on average for nearly three months, once they get an up or down vote they are then confirmed with literally no opposition. So far, only one of the thirty-one approved district court judges has received a single No vote; the rest were confirmed by votes like ninety-six to zero, or else by voice vote. Our office often gets inquiries from nominees who read about the "secret holds" placed by Senators on a nomination, wondering what issue has been raised about that

nomination. But, as used this Congress, “secret hold” is just procedure-speak for an institutionalized practice of slowing all judicial confirmations.

Where unanimous consent cannot be obtained, the Majority Leader’s only alternative is to file a cloture petition. The well-known 60-vote threshold required to win a cloture vote can be hard to achieve even with a 59-person majority. Less well-known is the massive procedural cost that comes with a successful invocation of cloture. Senate Rule XXII provides for thirty additional hours of post-cloture debate; that is, thirty more hours of precious floor time that can be used by the minority party even after the sixty-vote threshold to invoke cloture has been surmounted and before a nominee can receive an up-or-down vote. Again, this time can be waived by unanimous consent, but if the minority declines to consent, the Senate must wait thirty hours before voting, during which time no other business can be conducted on the floor.

In the parlance of the Senate, this tactic of refusing to waive the post-cloture debate time is referred to as requiring the Majority Leader to “burn” the thirty hours. So the “reward” for the Majority Leader for winning a cloture vote is losing all ability to conduct other Senate business for thirty hours. If the Majority Leader used cloture to move the 26 nominees on the Floor today, minority Senators would retain the procedural option to burn a total of 780 hours of floor time prior to final confirmation votes—assuming cloture could be successfully achieved in the first place. When the Senate calendar is crammed with important business, the Majority Leader cannot afford too many cloture victories, and in fact during the 111th the Majority Leader has forced cloture votes on judicial nominees only 4 times.

By repeatedly refusing unanimous consent on every nominee, no matter how uncontroversial, the minority party has gained total throttle control over the pace of confirmations.

What is the upshot of this state of affairs? The Ninth Circuit, with 17 of 142 judgeships vacant today, is roughly representative of the national 100 vacancies for 866 judgeships—a 12 percent vacancy rate in each case. The experience of the District of Oregon is being replicated in too many other places around the country. Two of its six authorized judgeships are vacant. President Obama nominated two highly-qualified individuals to these seats on July 14, but it appears unlikely that they will get a hearing this year. The court has continued to operate effectively by leaning on the assistance of six senior judges, four of whom are older than age 80. Chief Judge Aiken has shared with me the same story I hear from chief judges around the country, which is that you need help. The bad news on the interim report card is that if current trends hold, the future is not looking better. It is looking worse.

I make no criticism of Senate consideration of judicial nominees. The United States Senate has a solemn constitutional responsibility to evaluate judicial nominations before providing its advice and consent, and it is easy to dismiss criticisms of the procedures the Senate uses to perform its advice and consent function as tainted by simple partisan biases. Those who approve of a particular President's nominees decry the Senate's slow pace, while those who oppose those nominees and want to keep seats open in the hope that a better President will be elected the next time around defend the Senate and its need to be careful in evaluating potential members of the judiciary. I understand this. When I was chief counsel of the Senate Judiciary Committee, I tended to side with the Senate in this debate when we were working with a President from the other party. If I had more time, I could read for you quotations from individual senators condemning the Senate for its obstructionism, and then pair them with quotations from those same senators defending the Senate. The first are spoken when the Senator and the President are from the same party, while the second are delivered when they are from opposite parties.

It is hard to deny that partisans bring different perspectives to bear.

At the same time, I want to persuade you that there is a clear non-partisan basis for concluding that the Senate is failing to perform its job at a minimum level of acceptability. The constitutional machinery of presidential nomination followed by senatorial advice and consent ought at a minimum to be able to fill judicial vacancies as they occur with reasonable expedition. The Senate has a right to reject nominees of whom it disapproves and so sometimes "reasonable expedition" can be an extended period of time for a particular seat. But taking the judiciary as a whole, the Senate ought to be able to function at the replenishment rate, roughly keeping pace with the vacancies created by retirements, elevations, deaths and the occasional additions to the federal judiciary when the Congress adds new judgeships by passing a "judges bill." In the run of American history, the confirmation machinery has met that test, but it is not meeting it now. Vacancies on the federal bench are at 12% and rising.

Even without controversies over individual nominees, we should expect that some percentage of lower court seats will be vacant at any point in time because the process cannot possibly be instantaneous. So there is a certain structural vacancy rate for the federal judiciary that is impossible to eliminate. Looking over the vacancy rate going back over the past fifty years, it has almost never been below 5%, so I am going to use that figure as a good estimate.

Over that same period of time, the vacancy rate has doubled or more than doubled that figure, reaching into the double digits, on several occasions, but these have almost always been after Congress enacted a judges bill, creating a significant number of new seats all at once. Each time the vacancy rate has

been pushed up in that way, it has then been brought back down over the next several years. One of the few times the vacancy rate reached into the double digits without a vacancies bill was in 1998, when it just barely reached 10%. That was also the year, you may recall, when Chief Justice William Rehnquist issued an Annual Report on the State of the Judiciary calling attention to the strain on the judiciary caused by the high vacancy rate and then urging the Senate to provide up or down votes more promptly on President Clinton's nominees.

As I have said, the vacancy rate is once again in double digits. It stands at 12%—and it is climbing. And the trend line is in the wrong direction: As we stand and sit here today there are 45 more vacancies than when President Obama took office.

The confirmation machinery has actually been skirting the problem of being unable to keep up with vacancies for a long time. Between 1993 and 2008, there were on average 40 new vacancies each year. Over that same time period, the average confirmation rate in the United States Senate has been 43 judges per year. This rough parity was achieved at a time when there were no major judges bills increasing the number of federal judgeships. If we extend our look back to 1981, and look at the entire period 1981 to 2008, we can then include the impact of the last two major judicial expansions, in 1984 and 1990.⁵ During this period new vacancies averaged 48 per year while confirmations averaged only 45 per year. So over this longer period of time, total vacancies have gradually been creeping up as new vacancies slightly exceed new confirmations.

This situation is almost certainly about to get worse. On the confirmation side, the Senate of the 111th Congress is not going to come close to confirming 45 judges per year – the historical average over the past three decades – or even to 43 judges – the average during the Clinton and George W. Bush presidencies. The current **two year total** stands at just 40.

Not only are confirmations slowing down, vacancies are increasing. We are entering a decade in which the historical average of 48 vacancies a year is almost certainly going to be exceeded. My office has examined the demographic profile of the current federal judiciary, and calculated when each sitting judge will become eligible to retire under the Rule of 80. Starting with that information, we have also made some plausible assumptions about retirement rates, deaths and elevations. We further estimated that within the next decade Congress will enact another judges' bill, perhaps on the order of the bill currently pending in Congress that would add 63 judges. Combining the contribution of these sources of vacancies, we estimate that vacancies are going to run closer to 60 per year for the decade we are entering, compared to 48 per year for the

preceding 30 years. If that figure is reasonably close, the 43 judges per year that Presidents Clinton and Bush averaged will fall well short of closing the vacancy gap. And if the first two years of the Obama administration are indicative of the confirmation rate for the coming decade, the vacancy gap will explode.

On our estimates, if we just keep up with the Clinton/Bush rate of 43 confirmations per year – something, I repeat, that we are not now doing – we project that by 2020 there will be 300 vacancies on the federal bench. Over 30% of the federal bench will sit empty. If we were to assume that the Obama rate persists throughout the decade, nearly one half of the seats would be empty.

I do not believe that either of these scenarios is going to come to pass. The fact that they **would** come to pass unless the operation of the confirmation machinery changes is simply the best non-partisan argument I know for why changes must be made.

Changing the current system is going to be hard work. Judicial confirmations have become but one battlefield in a larger political war that finds the Congress increasingly divided. The moderate middle—the Republicans who are more liberal than the most conservative Democrats and the Democrats who are more conservative than the most liberal Republicans—has just about vanished. In fact, according to some of the organizations who try to tabulate such things, the middle disappeared entirely in the House of Representatives in 1995 and it has now disappeared in the United States Senate. The congressional parties face each other across a political divide that now has very few bridges to cross it. Under these circumstances, they find compromise on important items on their political agendas extremely difficult, and judicial appointments have become one of those important political agenda items. So long as judicial appointments are embedded in the larger environment of polarized politics, breaking out of our current downward spiral will not be easy.

I do not have any easy answers to pull out of the hat, either. What I can say in closing is this: after thirty years of building the contentious, sluggish and inefficient machinery that the Senate's confirmation process has become, it is time for members of both political parties to acknowledge the evident problem with business as usual and to come together around sensible reform proposals. Judged by the objective measure of whether the machinery can do its job, it is clearly in need of an overhaul.

Thank you for inviting me to speak to you today.

¹ The “elapsed time” figures here, as well as comparable ones throughout this text are only for nominations that received an up or down vote on the Senate floor. Dennis Steven Rutkus and Mitchel A. Sollenberger,

“Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003,” Table 8: U.S. District Court and Circuit Court Nominations: Average Number of Days Elapsing from Nomination Date to Final Action, 95th Congress to 108th Congress (1977-December 9, 2003) at CRS-28, February 23, 2004, CRS Report for Congress RL31635.

² Denis Steven Rutkis, Susan Navarro Smelcer, Maureen Bearden, “Nominations to Article III Lower courts by President George W. Bush During the 110th Congress,” Table 7: Nominees to the U.S. Court of Appeals and U.S. District Courts, Most Recent Presidents, at 19, March 8, 2010, CRS Report for Congress, RL33953.

³ As of August 2, 2010, votes on circuit judges who have been confirmed have occurred an average of 208 days after nomination, which is better than President Bush’s 266, while district court judges are taking 133 days compared to 127. Statistics compiled by the Office of Legal Policy. Figures for President Bush’s presidency are from Denis Steven Rutkis, Maureen Bearden and Kevin Scott, “Nominations to Article III Lower courts by President George W. Bush During the 107th - 109th Congresses,” at 19, March 10, 2008, CRS Report for Congress RL31868.

⁴ See 156 Cong. Rec. S5836. (daily ed. July 14, 2010) (statement of Sen. McConnell objecting to Sen. Hagan’s unanimous consent request for confirmation of Jim Wynn and Al Diaz, who had been waiting 167 days on the Floor after being reported 18-1 and 19-0 from Committee, on grounds that “the President has been so dismissive of the Senate’s right to provide advice and consent under the Constitution.”).

⁵ 85 in 1984 and 85 in 1990.