



Overloaded Courts, Not Enough Judges: The Impact on Real People

Courts play a critical role for our nation and our communities.

- All Americans count on being able to “get their day in court.”
- Court delays damage small businesses, whether they are seeking to vindicate their rights as plaintiffs or to put a lawsuit behind them.
- Courts – the infrastructure of justice – are just as important to the rule of law as roads and bridges are to transportation. Without enough judges, that infrastructure is crumbling.
- Making our courts fully functional is an issue of good government.

Federal judges are required to give priority to criminal cases over civil ones. Since the number of criminal cases has surged over the past several years – a 70% increase in the past decade – judges are forced to delay the civil cases, often for years. This means long delays for Americans seeking justice in cases involving:

- discrimination
- civil rights
- predatory lending practices
- consumer fraud
- immigrant rights
- environment
- government benefits
- business contracts
- mergers
- copyright infringement

When there aren't enough judges on the bench, many plaintiffs are forced into inadequate settlements, and small businesses are pressured to make unnecessary settlements to end the expense and uncertainty of litigation.

Connecticut: In the fall of 2012, nine out-of-state federal judges from as far away as Montana, Kentucky, Ohio, and South Dakota accepted Connecticut's chief district judge's request for volunteers to try several dozen cases in Connecticut and relieve the caseload.

Nevada: In February of 2013, Nevada district court judge Larry Hicks cited the shortage of judges as one of the reasons for delays in a First Amendment press freedom case remanded to him a year earlier. He said Nevada's judicial district is so understaffed that four judges oversee cases that seven judges used to handle; that the district's caseload has nearly doubled since it was fully staffed six years earlier; and that it was one of the busiest districts in the nation even then.

Utah: Dave Calder's 2-year-old daughter died when a gas can exploded inside his trailer, and he had severe burns over a third of his body. He sued in 2007. His medical bills reached more than \$200,000, and it took 4½ years before the case reached a jury verdict.

Illinois: Elizabeth and Nicholas Powers sued their employer for sex discrimination in 2008. As they were awaiting jury selection in 2011, the judge halted the trial so he could preside over a growing number of criminal cases. Rather than continue to wait for a trial, the Powers settled the case.

Colorado: Amy Bullock sued a truck manufacturer in 2008, saying it had a faulty design that caused her husband's death. The trial was delayed once in 2010 and again in 2011 to make room for criminal cases. The trial finally began in March, 2012.

Rhode Island: In January 2011, while Republicans were obstructing Jack McConnell's nomination (pending since early 2010), the Chief Judge had to reassign 27 civil lawsuits to New Hampshire and Massachusetts. This created significant travel and hotel expenses for litigants. (McConnell was finally confirmed in May 2011.)

Quotes from Federal Judges

"It would be nice to get some help. We are pedaling as fast as we can on an increasingly rickety bicycle." – Chief Judge Fred Biery, Western District of Texas (discussing the lack of enough judges in his district in March of 2013) . [Houston Chronicle](#), March 1, 2013

"We don't neglect the Seventh Amendment, the right to a civil trial. But we tell people, if this is what you want to do, it will take time to get there." Chief Judge William Skretny, Western District of New York. [The Impact of Judicial Vacancies on Federal Trial Courts](#), [Brennan Center For Justice](#), issued July 21, 2014

"This is corollary to having a big wild fire in the Southwest Border states, and fire fighters from Hawaii going there to help put out the fire." – Hawaii district court senior judge David Ezra (who announced in 2012 that he would move to a border state and quadruple his personal caseload in order to help judges there try criminal and civil cases within a reasonable time). [Hawaii Reporter](#), September 24, 2012

"It's like an emergency room in a hospital. ... The judges are used to it and people come in and out and get good treatment. But the question is, can you sustain it? Eventually you burn out." – Chief Judge Federico Moreno, Southern District of Florida. [The Impact of Judicial Vacancies on Federal Trial Courts](#), [Brennan Center For Justice](#), issued July 21, 2014

"We needed help to keep things at a manageable level." – Connecticut Chief Judge Alvin W. Thompson (explaining in Sept 2012 why he asked nine out-of-state judges to try cases in Connecticut). [Connecticut Post](#), September 24, 2012

"[T]he federal courts are stacked up with motions to dismiss and motions for summary judgment which are very fact specific and require a great deal of time. When you have fewer judges, and the judges who are in service have more motions, everything is delayed." – Judge John Jones, Middle District of Pennsylvania. [The Atlantic](#), September 9, 2012

"Ultimately, I think people will lose faith in the rule of law. ... We as a nation believe that if you have a dispute, you go to court and within a reasonable period of time, you get a decision." Judge Alex Kozinski, Ninth Circuit Court of Appeals. [Washington Post](#), Feb 8, 2011

If decisions on contracts, mergers and intellectual-property rights "can't be reached through quick and prompt justice, things unravel for business." Judge W. Royal Furgeson, Northern District of Texas. [Wall Street Journal Blog](#), Nov 10, 2011

"Let me make the point another way. Imagine if the Dallas Mavericks or the San Antonio Spurs or the Houston Rockets played their games with only four players on the court. Things wouldn't go well.

Neither will things go well in our federal courts if these vacancies persist.” Judge W. Royal Furgeson, Northern District of Texas. [Austin American Statesman](#), May 24, 2014

Octogenarian and Nonagenarian Judges Keeping the System Afloat

Pennsylvania (Middle District – a judicial emergency)

Senior Judge Malcolm Muir went to work every day until the summer of 2011, when he became ill in chambers and died at the age of 96. The day before he died, Robert Mariani’s unopposed nomination cleared the Senate Judiciary Committee, yet the nomination languished until October.

In the same district, senior judges picking up the slack include 91 year-old Judge William Nealon (a Kennedy nominee on the bench since 1962), Richard Conaboy (age 89), William Caldwell (age 90), and Edwin Kosik (age 90).

Illinois – Central District

In 2011, with three of four seats then vacant, Judge Michael McCuskey was forced to commute 90 miles between Urbana and Springfield and rely on two 81-year-old senior judges to fill the gap. "I had a heart attack six years ago, and my cardiologist told me recently, 'You need to reduce your stress,' " he said. "I told him only the U.S. Senate can reduce my stress."

Obstruction By the Numbers

As of November 6, 2015

Throughout most of President Obama’s term, a serious vacancy crisis has been damaging the federal court system, although the situation improved significantly in 2014 as the Senate processed more nominations. Still, about 10% of lower federal courts are now or will soon be vacant.

- Circuit courts: 11 vacancies (9 current, 2 future)
- District courts: 69 vacancies (54 current, 15 future)

Judicial emergencies are putting a substantial strain on the judiciary.

- “Judicial emergency” is a formal administrative term used by the Administrative Office of the U.S. Courts.
 - Circuit Court
 - any vacancy in a court of appeals where adjusted filings per panel are in excess of 700;
 - any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel.
 - District Court
 - any vacancy where weighted filings are in excess of 600 per judgeship;
 - any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship;

- any court with more than one authorized judgeship and only one active judge.
- Across the country, judges in their 80s and 90s who want to retire are staying on the bench to mitigate the caseload for other judges in their districts.
- Nearly half of current vacancies are judicial emergencies (30 in all)

Even if every vacancy were to be filled tomorrow, there would still not be enough judges to ensure every American's opportunity to have their day in court: Judges are so overwhelmed that the Judicial Conference of the United States [recommended](#) in March of 2015 that Congress create five new circuit court seats and 68 new district court seats (as well as make permanent nine district court seats that are now temporary). So filling vacancies is a priority.

The Senate is not living up to its responsibility to quickly consider and hold votes on circuit and district court nominees. Only in 2014 – [a year of striking success on judicial nominations](#) – was the obstruction overcome. But the process has been reversed in 2015.

- Senate consideration of judicial nominees has slowed down significantly in President Obama's last two years of office.
 - Judiciary Committee Chairman Chuck Grassley holds confirmation hearings infrequently and forces nominees to wait weeks or months longer than necessary for their hearing. In the first ten months of the year, Grassley held only seven confirmation hearings for circuit and district court nominees, and they usually could have accommodated more nominees than Grassley allowed. He has also routinely delayed scheduled committee votes on nominees without explanation.
 - Senate Majority Leader McConnell rarely schedules confirmation votes, so there are often long-waiting nominees. **Currently, there are 15 circuit and district judicial nominees who should have a vote.**
 - Half have been waiting for more than a month, four since June or July.
 - All were approved by the Judiciary Committee unanimously.
 - Nine are women or people of color.
 - Ten would fill judicial emergencies.
 - **This is a stark contrast to how the Democratic-controlled Senate processed George W. Bush's nominees during his last two years in office.**
 - Since the beginning of 2015, the number of current circuit and district court vacancies has increased from 40 to 63, and the number of those that are judicial emergencies has increased from 12 to 30.
 - In contrast, when Democrats controlled the Senate during George W. Bush's last two years, the number of current vacancies dropped substantially, from 56 at the start of 2007 to 45 at the start of November, and as low as 34 in the early fall of 2008.
 - The Senate has confirmed only nine circuit or district court nominees during this Congress. At the same point in 2007, the Senate had confirmed 34 nominees, and it confirmed 68 in all during Bush's last two years.

- The obstruction has been going on since the beginning of the Obama Administration, so that the confirmation pipeline is regularly clogged at the top by long-pending nominees who are needlessly denied a confirmation vote. This also delays the confirmation process for all nominees who follow.
 - Until the closing minutes of the 113th Congress in December 2014, Republicans had refused to consent to even one judicial confirmation since November of 2013. Every judge during that time, except for the final few, required a time-consuming cloture vote to overcome a filibuster (after which they were usually confirmed overwhelmingly, sometimes unanimously). In many cases, even after the cloture votes, Republicans invoked their rights under Senate rules to require hours of needless “post-cloture debate” before the confirmation vote itself can be held, a significant delaying tactic that discouraged Senate leadership from calling cloture votes even for consensus nominees.
 - During President Obama’s first six years in office (when Republicans were in the Senate minority), 93 of his circuit and district court nominees needed cloture votes to break filibusters. In contrast, during the entirety of George W. Bush’s presidency, 16 of his lower court nominees needed cloture votes to break filibusters.
- President Obama’s nominees have been forced to wait far longer after committee approval for a confirmation vote than was the case for George W. Bush’s confirmed nominees at the same point in his presidency.
 - Circuit court nominees: 89 days (Bush) vs. 129 days (Obama)
 - District court nominees: 39 days (Bush) vs. 99 days (Obama)
 - Both circuit & district: 49 days (Bush) vs. 104 days (Obama)

The seriousness of the problem has prompted widespread nonpartisan calls for the Senate to end the gridlock and address the vacancy crisis.

- Chief Justice John Roberts – [2012 Year-End Report on the Federal Judiciary](#)
 - “I therefore encourage the President and Congress to be especially attentive to the needs of the Judicial Branch and provide the resources necessary for its operations. Those vital resource needs include the appointment of an adequate number of judges to keep current on pending cases. At the close of 2012, twenty-seven of the existing judicial vacancies are designated as presenting judicial emergencies. I urge the Executive and Legislative Branches to act diligently in nominating and confirming highly qualified candidates to fill those vacancies.”
- Justice Anthony Kennedy – [Speech to the Ninth Circuit Conference](#), August 12, 2012
 - “When you’re appointed to a lifetime position, it’s proper for the political branch of the government to have considerable authority over that decision. On the other hand, there is a difference in a political function and a partisan function, and the current climate is one in which highly qualified eminent practitioners of the law simply do not want to subject themselves to this process. And I think it’s incumbent upon members of this conference,

particularly the members of the bar to face the fact that they have the responsibility to ensure that this appointment, selection, and confirmation progress is done without the partisan intensity that now accompanies it. This is bad for the legal system. It makes the judiciary look politicized when it is not, and it has to stop.”

- Former Justice Sandra Day O’Connor – [The New Yorker](#), Jeffrey Toobin post, June 11, 2012
 - “The confirmation process is taking longer than one would hope it would. It would be better if it could move along at a steady pace. You don’t want to leave positions vacant for a very long time.”
- Chief Justice Roberts – [2010 Year-End Report on the Federal Judiciary](#)
 - “Over many years, however, a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads. I am heartened that the Senate recently filled a number of district and circuit court vacancies, including one in the Eastern District of California, one of the most severely burdened districts. There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem.”
- ABA President Laurel G. Bellows, [The Hill](#), April 17, 2013
 - There are many losers in this stalemate. One is the judicial nominee, whose law practice and family suffer during the extended limbo of the pending nomination. Real costs are often borne by businesses whose viability relies on the timely resolution of commercial disputes, by defendants who lose jobs and sometimes family ties while languishing behind bars awaiting trial, and, ultimately, the public that expects courts to deliver on the promise of justice for all. Our economy depends on courts to enforce contracts, protect property and determine liability. Judicial vacancies increase caseloads per judge, creating delays that jeopardize the ability of courts to expeditiously deliver judgments. Delay translates into costs for litigants. Delay results in uncertainty that discourages growth and investment. With 60 percent more judicial vacancies at present than in January 2009 and pending civil cases in U.S. District Courts 7 percent higher than in 2005, vacancies are potential job-killers.
- ABA President William T. Robinson III, [letter](#) to Senate Majority and Minority Leaders, June 20, 2012
 - Amid concerns that the judicial confirmation process is about to fall victim to presidential election year politics through the invocation of the “Thurmond Rule,” I am writing on behalf of the American Bar Association to reiterate our grave concern for the longstanding number of judicial vacancies on Article III courts and to urge you to schedule floor votes on three pending, noncontroversial circuit court nominees before July and on district court nominees who have strong bipartisan support on a weekly basis thereafter. ...
 - We also urge you to continue to work together to move consensus district court nominees to the floor for a vote throughout the rest of the session, lest the vacancy crisis worsens in the waning months of the 112th Congress. With five new vacancies arising this month and an additional five announced for next month, this is not just a possibility;

it is a certainty, absent your continued commitment to the federal judiciary and steady action on nominees.

- U.S. Chief Judge J. Curtis Joyner (Eastern District of Pennsylvania), [As Eastern District Vacancies Grow, Reinforcements Unlikely](#), *The Legal Intelligencer*, June 15, 2012
 - “It delays justice,” Joyner said of the burden that having vacancies puts on the court. And, he said, “justice delayed is justice denied.”
- ABA President William T. Robinson III, [Nominees Deserve Votes by the Senate](#), *Charleston Post and Courier* op-ed, March 26, 2012
 - [A]pproximately one of every 10 federal judgeships remains vacant due to death or retirement. The rate has been steady for 24 months. ... Why is this a problem? An understaffed judiciary means case backlogs. Backlogs mean justice delayed in cases involving protection of individual rights, advancement of business interests, compensation for injured victims and enforcement of federal laws. ... Given the federal courts' long-term backlogs, it's important that nominations and confirmations outpace attrition.
- American Bar Association, [press release](#), February 27, 2012
 - “Washington’s partisan gridlock has stymied not just the policy process, but also the responsibility of the Senate to give advice and consent in the nomination process. Our federal court system—indispensable to the nation’s economy and the justice and freedoms we cherish—is being quietly undermined by needless deadlock.”
 - “Longstanding vacancies on courts with staggering caseloads impede access to the courts. They create strains that, if not eased, threaten to reduce the quality of our justice system. They erode confidence in the courts’ ability to uphold constitutional rights and render fair and timely decisions. Delay at the federal courts puts people’s lives on hold while they wait for their cases to be resolved. Businesses face uncertainty and costly holdups, preventing them from investing and creating jobs. In sum, judicial vacancies kill jobs.”
- American Bar Association, [letter](#) of October 13, 2011 to Senate Majority and Minority Leaders
 - “Filling existing vacancies on the federal bench has become a matter of increasing urgency. Across the nation, federal courts with high caseloads and longstanding or multiple vacancies have no choice but to delay or temporarily suspend their civil dockets due to Speedy Trial Act requirements. This deprives our federal courts of the capacity to deliver timely justice in civil matters and has real consequences for the financial well-being of businesses and for individual litigants whose lives are put on hold pending resolution of their disputes.”
 - “Nothing less than a sustained, concerted, and cooperative effort will be sufficient to make discernible progress in reducing the longstanding and dangerously high vacancy rate on the federal courts. And, as important, nothing less will assure litigants – businesses and aggrieved individuals alike – that our federal courts have sufficient judges to hear their cases in a timely and thorough fashion.”
- National Association of Assistant United States Attorneys – [letter](#) of December 17, 2010 to Senate Majority and Minority Leaders
 - “Judicial vacancies in our federal courts are reaching historic highs. Our members - career federal prosecutors who daily appear in federal courts across the nation - are

concerned by the increasing numbers of vacancies on the federal bench. These vacancies increasingly are contributing to greater caseloads and workload burdens upon the remaining federal judges. Our federal courts cannot function effectively when judicial vacancies restrain the ability to render swift and sure justice.”

- “We believe that all judicial nominees approved by the Senate Judiciary Committee are deserving of a prompt up-or-down floor vote.”
- Federal Bar Association (President) – [President’s Message](#), January 2011
 - “The phrase ‘Justice delayed is justice denied’ describes the situation we are facing in a number of circuits and districts throughout the country. The increasing number of federal judicial vacancies in the federal court system is straining the capacity of federal courts to administer justice in an adequate and timely manner.”
 - “The FBA’s foremost interest lies in the assurance of prompt, dispositive action by the President in nominating qualified federal judicial candidates and the Senate in either confirming or not confirming them in a prompt manner.”
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- U.S. Judge Timothy K. Lewis (retired, Third Circuit)
 - “A court with two or three vacancies simply cannot meet the demand with the efficiency the parties deserve and that the rules and procedures mandate. ... There are real-world consequences to this situation: businesses suffer while awaiting decisions on crucial matters; where there are liberty interests involved, people suffer. Imagine telling the man unfairly convicted that his appeal can’t be heard because there aren’t enough judges to handle it.” – [Blog post](#) for the National Constitution Center, September 12, 2011.
 - “Federal judges have reported being forced to handle criminal caseloads more than double what they confronted two years ago. This is limiting the access people have to the judicial system, often resulting in exasperating delays. In many states, senators’ unprecedented obstruction on the chamber floor has perpetuated this crisis. ... Senate inaction is compromising the judiciary’s constitutional responsibility to protect and preserve our liberties. ‘Justice delayed is justice denied’ isn’t just an old legal maxim - it should be a rallying call to action.” – [Scranton Times Tribune op-ed](#), February 17, 2012.