

THE STATE OF OUR COURTS

PART 2 OF 3: VACANCIES AND REFORM

SEPTEMBER 5, 2024

Introduction

While much attention is often paid to the make-up of the Supreme Court and the justices' impact on our country, the vast majority of federal cases are concluded before the U.S. District Courts and U.S. Courts of Appeals. As a result, the judges who sit on these courts have a huge impact on the lives of everyday Americans who turn to the federal judiciary for justice.

The below, the second in a series of three briefs, examines the current state of both circuit and district court vacancies and what reforms—in addition to policymakers' willingness to prioritize judicial nominations—are necessary in the long-term to ensure the American people can benefit from a well-functioning judiciary.

Current Vacancies

The Biden administration and Senate have made impressive progress on nominations and must continue to prioritize appointing qualified, fair-minded judges who represent a range of professional and life experience. Overall, the The Administrative Office of U.S. Courts lists a total of 70 judicial vacancies, broken down by 48 current and 22 future. Nominees for 33 of those vacancies are pending before the Senate, with an additional three announced during the August recess.

Filling these seats matters. The current judiciary is overworked, with significant backlogs that delay the administration of justice, meaning ordinary people must often wait years for their day in court.

Expansion of the lower courts was once common, distributing cases evenly across judges. In the 100 years after the modern Courts of Appeals were established in the 1800s, Congress expanded the size of those courts nearly 30 times. Yet, despite some momentum to expand courts at the district level and repeated requests by the judiciary itself, there hasn't been any significant expansion enacted since 1990.

Congress's gridlock has so far prevented these necessary adjustments from occurring in any meaningful fashion in decades. Unfilled vacancies only worsen this problem.

Needed Action

First and foremost, the Senate should move to swiftly confirm all outstanding nominees.

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But there are additional steps that should be taken moving forward—and one in particular is immediately achievable.

Blue Slips

The vast majority of the current and future district court vacancies without nominees are in states with at least one Republican senator. Due to an optional Senate rule known as the “blue slip process,” the nominees’ home-state Senator must agree to allow the nominee to move forward in order to begin the confirmation process.

Blue slips are not law, nor are they even codified in Senate rules. It is a practice determined by whoever serves as the Chair of the Senate Judiciary Committee. Previously, blue slips were required for both Circuit and District Court nominees. During the Trump administration, however, then-Chair Grassley (R-IA) eliminated their use for Circuit nominations while keeping the practice in place for district court nominees. The current chair, Sen. Dick Durbin (D-IL) has put in place the same rule.

Currently, blue slips allow Senators to essentially veto any judicial nominee from their state that they object to for any reason *or no reason at all* and slow the confirmation process for purely political reasons.

As a result of many Republicans’ opposition to giving President Biden’s nominees a fair chance, the administration faces a disincentive to even nominate individuals for some seats in which they have reason to suspect the home-state senator will not allow the candidacy to move forward.

As a baseline, the current blue slip practice should be reformed to prevent political blockades now and in the future for all nominees in order to ensure more Americans can access justices through the courts.

Conclusion

Addressing the failings of the blue slip process is not the only needed step to ensure the judiciary works at full strength. As referenced above, the judiciary as a whole is badly in need of expansion—the Federal Judicial Conference itself has been making requests to Congress for more circuit and district judgeships for years. But as efforts for lower court expansion play out, lawmakers owe it to the American people to take action and fill every vacancy possible.