

JUDGE NEIL M. GORSUCH  
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

**SUPPLEMENTAL APPENDIX 12(a)**

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**THE JUDICIAL CONFIRMATION CRISIS**  
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**THE JUDICIAL CONFIRMATION CRISIS**  
by Neil Gorsuch and William Marsan

**Q. What Is the Senate's Record on President Bush's Judicial Nominations?**

- President Bush has nominated 99 judges. Only 43 have been confirmed. At this point in his Administration, 57% of President Clinton's nominees had been confirmed.
- The Judiciary Committee's tactic of holding up circuit court nominees is transparent. Only 7 of the President's 29 nominees to the circuit courts (24%) have been confirmed.
- President Bush nominated his first 11 circuit court judges on May 9, 2001 – almost a year ago. Eight of these were appointments to vacancies classified as "judicial emergencies" by the non-partisan Administrative Office of the United States Courts. Yet only 3 of those nominees has even received a hearing.
- 95 of the 862 federal judgeships, or 11% of all judgeships, are vacant. This includes 31 vacant circuit judgeships, or 17.3% of all circuit seats, and 64 vacant district judgeships, or 9.6% of all district court seats.
- Under President Clinton, Republicans generally kept judicial vacancies between 50 and 75.
- During the 2000 campaign, President Bush called on the Senate to vote on the next President's nominations within 60 days, whoever won the election. Senator Patrick Leahy, now Chairman of the Senate Judiciary Committee, endorsed the idea on the Senate floor: "Although we are different parties, I have agreed with Gov. George Bush."

**Q. Why Does It Matter That 95 Judgeships Remain Vacant?**

- There is a judicial emergency. The Administrative Office of the U.S. Courts, a nonpartisan agency of the federal judiciary, has declared that 32 of the 95 vacancies are in areas with filings generally in excess of 600 cases per district judge or 700 cases per appellate panel.
- To take one example, the 6th Circuit has only 8 of 16 seats filled. President Bush has made nominations to fill 7 of the 8 seats; none of these nominees has been confirmed. In the Sixth Circuit, it can take two years to have an appeal heard and resolved.
- Chief Justice Rehnquist recently warned that the present judicial vacancy crisis is "alarming." Three years ago, when judicial vacancies during the Clinton Administration were in the 80s, much lower than today's 109 vacancies, Chief Justice Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."
- Both parties have traditionally recognized that so many vacancies are dangerous to the administration of justice and the viability of our judicial system:
- On February 14, 2000, when vacancies hit 75, Senator Leahy warned that "the

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vacancies in the federal judiciary are again topping 75 and the vacancies gap is again moving in the wrong direction. . . . I have challenged the Senate to regain the pace it met in 1998 when the Committee held 13 hearings and the Senate confirmed 65 judges. . . . Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedom and independence. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility."

· In March 2000, when vacancies were at 75, Senator Tom Daschle, now Senate Majority Leader, said there was a "dire shortage" of judges and that "we have a judicial emergency now, throughout the country."

· In January 1998 when there were 83 vacancies, Senator Leahy stated that "any week in which the Senate does not confirm three judges is a week in which the Senate is failing to address the vacancy crisis. Any fortnight in which we have gone without a judicial confirmation hearing marks 2 weeks in which the Senate is falling further behind."

· In 1998, at a time when there were 84 vacancies, Senator Richard Durbin announced that "we are facing a nationwide crisis. Our judicial system is being slowly but surely strangled."

#### **Q. By Delaying Confirmation Votes, Aren't Democrats Just Doing to President Bush the Same Things Republicans Did to President Clinton?**

· No. President Reagan had 382 judges confirmed during his eight years in office, with 6 years when the Senate was controlled by his own party. President Clinton had 377 judges confirmed, despite 6 years when the Senate was controlled by the opposing party.

· The Republican Senate left only 67 judgeships vacant when Clinton left office (a vacancy rate of 7.9%) and 41 nominations hanging at the end of his term. By contrast, a Democratic Senate left former President Bush with 97 vacancies (a vacancy rate of 11.5%) and 54 nominations hanging at the end of his term. Now there are 95 vacancies.

#### **Q. Is the Backlog of Nominations the Result of the Senate Being Too Busy with the September 11 National Tragedy?**

· No. The backlog of judicial vacancies existed before September 11.

· The Senate can confirm many of the President's nominations quickly and easily. District Court nominees are often confirmed without a committee hearing. There are 33 such nominations pending. Even for the Circuit Court nominees, typically several nominees are considered in a single Senate hearing.

· The fight against terrorism depends on an operational and efficient court system for trials, hearings, and wiretap orders. The judiciary should be fully operational at a time of national crisis, not suffering certified "emergencies" in backlogged courts across the country as a result of partisan bickering.

#### **Q. What is the Senate's Legitimate Role in Providing Its "Advice and Consent"? Is Ideology Relevant to the Senate Confirmation Process?**

· The Framers intended that "in the business of appointments, the executive will be the principal agent." The Federalist No. 65. President Bush won the election and is entitled to "tilt" the judiciary in the direction he feels appropriate. Clinton won only 43% of the popular vote in 1992 and less than 50% in 1996, but he was afforded deference in his judicial choices, with 377 confirmations over 8 years (comparable to President Reagan's 382).

· The Framers saw the Senate's duty as focused on the nominee's integrity, qualifications, and ability. The Senate's role, they wrote, is to "prevent the appointment of unfit characters." The Federalist No. 76.

· Lloyd Cutler, White House Counsel to President Clinton, testified before the Senate on June 26, 2001, that "to make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken the public confidence in the courts."

· Every one of President Bush's nominees that has been reviewed by the liberal American Bar Association ("ABA") has been rated fit for the post to which they have



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been nominated. In fact, the ABA has rated 70% of President Bush's nominees to be "well qualified," the ABA's highest rating. (James Lindgren of Northwestern University found that Clinton nominees had more than 10 times better odds of getting the ABA's highest rating than similarly-credentialed nominees by former President Bush). Chairman Leeb has called the ABA rating the "Gold Standard" for determining fitness.

#### **Q. What Kind of Judges Is President Bush Appointing? Are they Going to Rewrite the Law in Favor of "Conservative Causes"?**

- President Bush believes that judges should interpret the law, not make it. The people, through their elected representatives, control what the laws say and President Bush expects judges to enforce the laws as written, whether or not they agree with those laws. President Bush emphasized recently that "every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. . . . Courts exist to exercise not the will of the men, but the judgment of the law. My judicial nominees will know the difference."
- The Framers shared this view on the role of judges: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body." The Federalist No. 78.
- Justice Felix Frankfurter, appointed by FDR, also agreed, saying that "the highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law."
- Lloyd Cutler, President Clinton's White House Counsel, testified before the Senate in July that a judge should ensure that "the law will be fairly read and applied, irrespective of the judge's personal views as to its wisdom."

#### **Q. Is the Administration Using a "Litmus Test" on "Conservative" Causes Such As the Abortion Issue?**

- No nominee has been asked by this White House about how he or she would rule on any specific issue.
- The abortion issue is irrelevant to these vacancies. All of the 95 vacancies are on the district courts and courts of appeals. They have no power to overrule, revisit, or ignore Roe v. Wade.
- Past accusations of "litmus testing" by Republican Administrations have been proven to be utterly without basis. Reagan nominated Justice Sandra Day O'Connor and Justice Anthony Kennedy. Former President Bush nominated Justice David Souter. Former President Ford nominated Justice John Paul Stevens. These 4 Republican nominees have all repeatedly voted to uphold Roe v. Wade.
- No president can be sure how his nominees will vote once confirmed. President Eisenhower nominated Chief Justice Earl Warren and Justice William Brennan, both of whom proved to be liberal jurists. President Nixon nominated Justice Harry Blackmun, who later authored Roe v. Wade. President Kennedy nominated Justice Byron White, who opposed the creation of an abortion right, Miranda warnings, and other "Warren Court" initiatives.
- There is a famous story about President Lincoln and the appointment of Justice Samuel Chase, involving the legal tender case in which the Supreme Court split evenly 4-4 on whether the federal government had the right to issue paper money as an emergency measure during war. Lincoln wrote to a friend that "we cannot ask the man how he would decide the case on reargument, and if he should answer us, we should despise him for it. Therefore, we must pick a candidate of whose views we are absolutely certain." So Lincoln chose Chase, who had been a member of his Cabinet and who had presented the legal tender bill to Congress and pushed its enactment. In the end, Justice Chase, on rehearing, cast the deciding vote against the very statute he had helped present. Not even Lincoln could predict how his close friend and ally would vote.

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