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**Judges**

**JUSTICE DELAY = JUSTICE DENIED:**

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President Clinton Takes Action on Judicial Nominees -- Republicans Play Politics

**Key Points:**

- **Justice Delayed Is Justice Denied.** Nearly one in ten (91) federal judicial offices are currently vacant. According to Chief Justice William Rehnquist, "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."
- **President Clinton's Action vs Republican Delays.** While President Clinton took action and nominated 80 judges last year, the Republican Senate confirmed only 36 judges -- less than half of the President's nominees. In fact, the vacancy crisis can be traced to 1996, when Republicans confirmed only 17 judges and, for the first time in more than forty years, failed to confirm a single Appeals Court judge.
- **President Clinton's Nominees Are "Well-Qualified" and Diverse.** President Clinton has had more nominees confirmed that were rated "well-qualified" by American Bar Association than any other president in our nation's history. President Clinton also has nominated more women and minorities than any other president. However, the Senate has been slow to confirm these women and minority nominees -- 12 of the 14 nominees that have been held up the longest are women or minorities.
- **Republicans Play Politics With Judiciary.** Republicans have politicized the judiciary by intimidating sitting judges with threats of impeachment and aiding the fundraising efforts of a conservative group designed to block the President's nominees.

## JUSTICE DELAYED = JUSTICE DENIED

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### President Clinton Takes Action on Judicial Vacancies -- Republicans Play Politics

*" Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary....The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. "*

-- Chief Justice William Rehnquist  
1997 Year-end Report on the Federal Judiciary, 1/1/98

There are currently 91 vacancies in the Federal judicial system. According to Chief Justice William Rehnquist, the current level of vacancies threatens to jeopardize the quality of justice in America. President Clinton responded by nominating 80 judges in 1997. However, Republicans have politicized the judiciary by refusing to act on the President's nominees -- confirming less than half of the President's nominees in 1997. The consequences of these vacancies are felt by the thousands Americans -- like families seeking life insurance proceeds or a senior citizen trying to collect Social Security benefits -- for whom justice delayed can often mean justice denied. Senate Republicans ought to heed the Chief Justice's call to safeguard the quality of justice in America.

### 91 Vacancies In Federal Judiciary; 29 Emergencies

As of January 1, 1998, there were 91 vacancies in the federal judicial system -- 29 of these vacancies are considered emergencies by the Administrative Office of the Courts because they have been empty for over 18 months. According to the *New York Times*, Chief Justice William Rehnquist (who was appointed by President Nixon) "criticized the Senate for failing to move more quickly on judicial appointments, saying that the 'vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.'" Rehnquist's remarks were made in his annual year-end report of the state of the judiciary. [New York Times, 1/1/98]

### President Clinton Responds With Action; Republicans Play Politics

**While President Clinton Took Action and Nominated 80 Judges ...**

In response to this growing crisis created by increasing judicial vacancies, President Clinton took action and nominated 80 judges in 1997. The President even called on the Senate to confirm more of his nominees in the September 27, 1997, radio address, saying:

"So today I call upon the Senate to fulfill its constitutional duty to fill these vacancies. The intimidation, the delay, the shrill voices must stop so the unbroken legacy of our strong,

independent judiciary can continue for generations to come. This age demands that we work together in bipartisan fashion -- and the American people deserve no less, especially when it comes to enforcing their rights, enforcing the law, and protecting the Constitution.” [President Clinton’s Saturday Radio Address, 9/27/97]

### **...Republicans Confirmed Less Than Half of The President’s Nominees**

In 1997, Senate Republicans confirmed only 36 -- or less than half -- of the President’s judicial nominees. However, a closer look at the numbers for last year do offer some hope that by the end of the year, the Senate was finally returning to its traditional role of considering judicial nominees. In the first nine months of 1997 (from January to Labor Day) the Republican Senate confirmed only 9 judges -- an average of a judge a month. But, in the seven weeks prior to the Congressional adjournment -- with public concern mounting about judicial vacancies -- the Republican Senate confirmed 27 judges.

✓ **1996 Republican Senate Set Record Lows for Confirmations.** Republican inaction on judicial confirmations can be traced back to the 1996 election year. That year, the Republican Senate held only 3 hearing on judicial nominees and confirmed only 17 of them -- the lowest election year total in more than 30 years. In fact -- for the first time in more than 40 years -- the 1996 Republican Senate did not confirm a single one of the eight Appeals Court nominees that were pending.

### **Historical Context: In 1992, Democratic Senate Confirmed 66 Bush Nominees**

Recent history provides some context to this historic slowdown in judicial confirmations. During the 1992 election year, the Democratic Senate held 16 hearings on George Bush’s nominees and confirmed 66 of them -- even confirming one nominee as late as one month before the Presidential election. In 1985, during President Reagan’s first year of his second term, a Republican Congress confirmed more than 80 federal judges.

## **What’s at Stake -- Real People are Hurt by the Judicial Vacancy Crisis**

**The Human Factor -- Cost of Republican Delays in Confirming Judges: Judge Hug Said Social Security Cases Won’t Be Heard.** Ninth Circuit Chief Judge Procter Hug, Jr. has spoken out about the effects of vacancies in the judiciary. Hug claimed in August 1997 that lack of judges forced him to cancel arguments in 600 cases that year. Judge Hug also says the effects of judicial vacancies will be felt by real people.

Judge Hug: “The person who has a disability claim against social security, that won’t be heard. Persons who have claims against insurance carriers for non-payment of medical expenses, that won’t be resolved one way or the other.” [Nightline, 8/4/97]

## President Clinton's Nominees Have Been Well-Qualified, Diverse

### **Record Number of President Clinton's Confirmed Judicial Nominees Were Rated "Well-Qualified"**

President Clinton has nominated and had confirmed the most judges rated "well-qualified" by the American Bar Association, since it has been rating nominees.

### **The President Nominates Record Numbers of Women and Minority Nominations**

President Clinton has gone to great lengths to ensure that his judicial nominations look like America. 34, or 43 percent, of President Clinton's 80 judicial nominees in the last year have been women or minorities.

**Republicans Hold Up Minority and Women Nominations.** However, the Republican Senate has only confirmed 11 of the women or minorities the President has nominated -- stranding 23. In fact, of the 14 nominees that have been held up the longest 12 (or 86 percent) are women or minorities. [CQ Weekly, 11/22/97]

## Republicans Politicize Judiciary

### **DeLay Admitted Threats of Impeachment Designed To Intimidate Federal Judges**

On March 11, 1997, House Majority Whip Tom DeLay announced that Congressional Republicans would seek to impeach activist federal judges. In describing the effort DeLay said, "As part of our conservative efforts against judicial activism, we are going after judges. Congress has given up its responsibility in [overseeing] judges and their performances on the bench, and we intend to revive that and go after them in a big way." In September, DeLay admitted his tactics were designed to intimidate federal judges, saying, "*The judges need to be intimidated.*" [Washington Times, 3/12/97; Washington Post, 9/14/97]

### **Republican Senators Aided Conservative Group's \$1.4 Million Fund Raising Drive To Fight Judges**

Four Republican Senators appeared in a 15-minute fundraising video distributed in November 1997 by the Judicial Selection Monitoring Project, an arm of the conservative Free Congress Foundation, that columnist Anthony Lewis described as the "principal instrument" in the far right's campaign to block the President's judicial appointments. A mailing which accompanied the tape promised large donors "private briefings and intimate dinners" with "leading conservative elected and public figures closely involved with the judicial confirmation process."

The mailing was part of the Project's \$1.4 million fundraising campaign to further their cause of blocking Clinton's appointments to the federal bench. Of the four -- Senators Phil Gramm (TX), Jeff Sessions (AL), James M. Inhofe (OK), and Robert C. Smith (NH) -- only Senator Inhofe admitted knowing his remarks would be used for fundraising. None of the Senators said they had agreed to meet with contributors. [New York Times, 11/14/97; New York Times (Anthony Lewis), 10/27/97]

**JUDICIAL VACANCIES**  
**As of 1/6/98**

<b>CONFIRMATIONS IN 1997</b>	<b>36</b>
<b>NOMINATIONS IN 1997</b> <b>(Does not include withdrawn nomination</b> <b>of James Ware)</b>	<b>80</b>
<b>CURRENT VACANCIES</b>	<b>91</b>
• Includes 87 Article III & 4 Article I (Claims Court) vacancies	
<b>PENDING NOMINEES</b>	<b>44</b>
• 13 circuit, 29 district, 2 claims	
<b>CURRENT VACANCIES WITHOUT PENDING NOMINEES</b>	<b>47</b>
• 10 circuit, 32 district, 3 cit, 2 claims	

BRUCE FEIN

**B**eware! Senate Republican yahoos are in the saddle.

Their gallop towards a constitutional abyss behind the stern-visaged chairman of the Senate Judiciary Committee through abuse of the confirmation power has alarmed even the unflappable chief justice of the United States, William H. Rehnquist. In his 1997 annual report on the federal judiciary issued on Dec. 31, the disinterested and customarily conservative jurist entered the political fray with an unvarnished complaint: namely, that Chairman Orrin G. Hatch, Utah Republican, and the committee majority were irresponsibly blocking the filling of urgently needed judgeships by killing presidential nominations through malign neglect, a crude tactic that escapes the accountability of an up-or-down vote.

Approximately 10 percent of the nation's more than 800 judgeships remain vacant, and, Chief Justice Rehnquist underscored, "Vacancies cannot remain at such high levels without eroding the quality of justice," a variation of the maxim that justice delayed is justice denied.

The chief justice acknowledged the constitutional role of the Senate in the appointment of federal judges, including a right to reject any particular nominee. But, he insisted, that check on executive power envisioned its assertion through Caesarlike confrontations with the president in the sunshine, not by Fabian tactics hatched in non-smoking dark rooms. Mr. Rehnquist persuasively amplified: "The Senate confirmed only 17 judges in 1996 and 36 in 1997, well

# The Chief Justice vs. Hatch



William H. Rehnquist

under the 101 judges it confirmed during 1994 [when the Democrats controlled the body]. The Senate is, of course, very much part of the appointment process for any Article III judge. One nominated by the president is not 'appointed' until confirmed by the Senate.

"The Senate is surely under no obligation to confirm any particular

nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the president can then send up another nominee."

Mr. Hatch has defended his lethal temporizing with judicial nominees by accusing President William Jefferson Clinton of nominating would-be "activists" eager to invent laws rather than interpret them: "The No. 1 problem happens to be activist judges who continue to find laws that aren't there and expand the law beyond the intent of Congress."

That defense is as empty as Mr. Micawber's wallet. As the sole elected officeholder with a nationwide constituency, the president is constitutionally entitled to appoint judges entrusted with corresponding nationwide interpretive powers. The Founding Fathers endowed the Senate with a subordinate confirmation power to screen only for competence, corruption or cronyism. They rejected a proposal to lodge the appointment power in the Senate.

Thus, if Mr. Clinton desires "activist" judges who conscientiously pledge adherence to their constitutional oaths, the Senate should bow to his nominating prerogative. Ditto when a Republican occupies the White House and confronts a Senate controlled by Democrats. The rejection of President Ronald Reagan's Supreme Court nominee Judge Robert H.

Bork in 1987 because sporting an interpretive philosophy unfriendly to the latitudinarian druthers of Democrats was constitutional heresy deserving of condemnation, not of imitation.

Moreover, even if "activism" symptoms would justify Chairman Hatch in voting against confirmation, an unspoken constitutional presumption is that the sentiments of the Senate majority will prevail through an official tally. Public and authoritative voting is a bedrock of political accountability. Furthermore, it is the Senate as a whole, not a Napoleonic chairman or a committee of willful men, that the Constitution crowns with the confirmation power.

Several informal constitutional rules of the game are binding despite their informality. The Constitution, for instance, declines to stipulate the number of Supreme Court justices. The total has varied from six to 10, but has been fixed at nine for approximately 125 years. President Franklin D. Roosevelt aimed to manipulate the number in his ill-conceived and sinister court-packing plan; the revolutionary gambit was sharply rebuffed both by an overwhelmingly Democratic Congress and the people. It would be possible for Chairman Hatch and his fellow yahoos to emasculate the Supreme Court by killing by committee inaction every nominee selected after the death or resignation of an incumbent. By that

Machiavelian tactic, the Supreme Court would die on Mr. Hatch's installment plan.

A sister unenumerated constitutional obligation requires the president with reasonable dispatch to give life to agencies or commissions created by Congress by nominations of their apex officers, for example, the United States Sentencing Commission. Suppose President Clinton balked at nominations because of antagonism to the Sentencing Commission's mission. Wouldn't that neglect violate Mr. Clinton's constitutional duty to faithfully execute the laws? Indeed, Chief Justice Rehnquist rebuked the president's prolonged tardiness in filling commission vacancies in his 1997 annual report.

The Constitution will metamorphize into a feeble scrap of paper unless all three branches operate in good faith in exercising their discretionary and overlapping powers in accord with substratum assumptions. As Paul instructed, "The letter killeth, but the spirit giveth life." And if those considerations are unpersuasive to Senate yahoos, they should ponder a cardinal rule of political life: Never create or assert an official prerogative that could not be safely entrusted to your adversaries.

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# The Chief Justice and Mr. Hatch

No one has ever accused Chief Justice William Rehnquist of bleeding-heart tendencies. It was thus extraordinary for him to get into a confrontation last week with Senator Orrin Hatch and other conservative Republicans over what the Chief Justice said was an inexcusable holdup by the Senate over President Clinton's nominations for the Federal bench. Mr. Hatch, chairman of the Senate Judiciary Committee, dismissed the criticism, blaming President Clinton for the delays and the Federal judges for the problem of overworked courts. His response was disingenuous. The vacancies in nearly 1 out of 10 seats on the Federal bench result from obstructionism by certain members of the Senate.

Politics can never be separated from the confirmation process, but Chief Justice Rehnquist was right to describe Republican behavior as unusual. It is not simply that conservatives are eager for revenge over what they still feel was unwarranted Democratic hostility to the Supreme Court nominations of Robert Bork and Clarence Thomas. More important, Republican strategists have decided that fulminating about liberal judges fires up the faithful and raises money. The charge is absurd, since Mr.

Clinton's appointments have been distinguished by their moderation. In fact, many of the judges reviled in the right-wing fund-raising appeals were appointed by Presidents Reagan and Bush.

Whatever their reasons, Republican obstructionism is worse than anything Democrats did in the past. Mr. Clinton nominated 78 judges last year, the Senate confirmed only 36. Some names have been sent to the Senate floor by the Judiciary Committee only to be held up because one or more right-wing Senators exercised their prerogative to block a vote. At least 11 nominations have been sitting around for more than a year. As the Chief Justice pointed out, if the Senate wants to reject nominations, it should do so with an up-or-down vote.

As the most important Senator on judicial matters, Mr. Hatch has shown independence in the past. He has even endorsed judicial nominees that his own colleagues oppose. Now that Chief Justice Rehnquist has shown the leadership to speak for the institutional needs of the bench, Mr. Hatch should rise to the occasion and address the institutional responsibilities of the Senate rather than surrendering to the petty tactics of the blockading few.

New York Times, 1/5/98

# Halt the stonewalling on judicial nominees

By DeWayne Wickham

"Justice delayed is justice denied." That's the point I think Chief Justice William Rehnquist tried to drive home last week when he criticized the painfully slow pace of Senate confirmation of judicial appointments.

The Republican-controlled Senate has given new meaning to the term "all deliberate speed" in its consideration of the judicial nominations of Democrat Bill Clinton. In 1994, the last year Democrats controlled the Senate, 101 of the president's nominees won confirmation. In 1996, the first full year of Republican control, that number dropped to 17 with 28 pending. Only 36 of Clinton's 70 judicial nominees were confirmed last year. Currently, there are 82 vacancies out of 846.

Conservatives are ecstatic at this turn of events. Liberals are in mourning. Orrin Hatch, the Senate Judiciary chairman, says that in giving Clinton's nominees close scrutiny Republicans are just doing their job. GOP senators have a responsibility to keep judicial activists off the federal bench, he says. What he means is that they are obsessed with stopping anyone to the left of Charlton Heston from becoming a federal judge.

Democrats played the same game when Ronald Reagan was president, although they were not nearly as good at it. Democrats blocked the judicial appointments of ultraconservatives like Robert Bork, whose name has now become part of the lexicon of the confirmation process. To fall victim to this form of political tribalism is to be "Borked."

Sadly, this political gamesmanship is not without its victims. Cases are backing up, and the time it takes to get an issue before overworked federal judges is increasing. Ironically, while the Republican-controlled Congress has sharply expanded the number of crimes that will land an accused person in federal court, it has denied the federal system the full complement of judges it needs to take on this heavy workload.

Rehnquist wants this nonsense to stop. Coming when it did, his criticism is seen by some as a finger in the eye to the GOP, which

put him on the high court. I don't think so. More likely, the shortage of federal judges has just reached the boiling point, and Rehnquist wants to sound the alarm.

Presidents — even Republican conservatives — have a right to name who they want to the federal bench. The Senate's advise-and-consent role is better used to keep scoundrels — child molesters, wife beaters, racists and other scalawags — off the court than to enforce the ideological litmus test that now prevails.

Don't expect Rehnquist's criticism, or my exhortation, to change things. The 2000 presidential campaign is already under way. Too many Republicans believe anything they do to weaken Clinton will hurt Vice President Gore, the front-runner for the Democratic nomination.

By slowing down the rate of approval of Clinton's lifetime appointments to the federal courts, Senate Republicans are cutting the political capital he would have gained from the Democratic senators and state party organizations that are the driving force behind many of his nominees.

The fewer political IOUs Clinton has to cash in for Gore two years from now, the greater the chance Democrats will wage a divisive dog fight for the party's presidential nomination. And if Republicans regain the White House at the start of the next century, there'll be the added benefit of a GOP president having all those judicial vacancies to fill.

It's time for Republicans to stop stonewalling Clinton's judicial nominations. When it comes to ambushing would-be federal judges, they have proved they're much better at it than Democrats. Now it is time for them to show they can make peace as well as war. Not because they've beaten Democrats to a pulp on this issue — though it seems they have. Instead, they should call it quits because they're doing a lot more damage to the country than to their political opposition.

But don't take my word for it. Ask the chief justice of the United States what he thinks.

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**The Chicago Sun-Times (1/5)** wrote: "The time has come for the US Senate to stop playing politics with the American judicial system. ... If Republicans have reason to believe that any of President Clinton's picks for the bench are unqualified for any reason, the lawmakers should vote with their nays, not their silence. ... By leaving these judgeships vacant...politicians are telling voters that it is more important to win a political tug-of-war than to conduct the business of the court."

**The Detroit Free Press (1/3)** wrote: "Supreme Court Chief Justice William Rehnquist's criticism of the US Senate's use of brazen partisan politics to hinder President Bill Clinton's appointment of judges to the Federal judiciary was a welcome and much needed rebuke of the Senate Judiciary Committee. ... (T)he courts are too important an institution to be a pawn in a game between Senators and the President. If Sen. Hatch truly respected the courts and our democratic system, he would cease his corrosive political games."

**The Knoxville News-Sentinel (1/5)** wrote: "A few (qualifications) are necessary...even though Rehnquist is correct that the Senate could and should move more quickly in filling 82 vacancies, which account for almost 10 percent of all Federal judgeships. ... (T)here is a substantive, nonpartisan issue here, namely the worry that activist, liberal judges have often disregarded constitutional imperatives and usurped legislative prerogatives, thereby throwing democracy out of kilter. ... It's crucial that the Senate exercise caution in approving President Clinton's nominees. The Senators must find out what legal principles these people stand for, what their constitutional faith is. ... More cooperation by both sides would help, as long as the Republicans do not relinquish their demand that the nominees exhibit respect for Constitutional restraint."

**The Los Angeles Times (1/5)** wrote: "Chief Justice William H. Rehnquist has tabbed the Senate's petty, partisan game on judicial appointments as what it is: political retribution, pure and simple. ... Rehnquist, while acknowledging that Clinton has been slow to nominate people to fill vacant seats, laid the blame for the delays where it belongs, on Senate Republicans who have sat

on the nominations of worthy men and women while lamely complaining about their 'activist' tendencies. ... To Republicans, still smarting from a Democratic-led Senate's rejection of four nominees (including Robert H. Bork) forwarded by Ronald Reagan or George Bush, turnabout is fair play and tarring Clinton's nominees helps raise support for conservative causes. Sen. Hatch surely knows these are not worthy justifications. In the name of justice, he should move ahead."

**The Portland (ME) Press Herald (1/3)** wrote: "Chief Justice William Rehnquist has grown tired of the US Senate's gamesmanship with regard to nominees to the Federal bench, and who can blame him? ... GOP leaders in the Senate have delayed action on scores of nominees because, they say, they want to ferret out nominees they perceive as 'activist' or, in plain terms, liberal. ... The way the Senators have gone about it is troubling, however. Regardless of their politics...nominees to the Federal bench deserve fair consideration and a vote on their qualifications. Leaving them hanging serves neither the cause of justice nor the political process."

**The San Antonio Express-News (1/4)** wrote that " the extraordinary criticism by the Chief Justice of the Supreme Court for the Senate's slow pace in approving judicial nominations should draw public attention" and "is harsh criticism for Sen. Orrin Hatch...whose duty is to hold hearings on and confirm or reject" judicial nominees. "Hatch retorted that judges are not overworked because of the judicial vacancies, an argument that strikes us as absurd. ... Clinton nominees whom the Senate finds to be outside the mainstream of legal thought or unqualified should be voted down. The others should be confirmed. Hatch and his fellow Senators should schedule hearings immediately. Enough of simply stonewalling and political posturing."

**The St. Paul Pioneer Press (1/4)** wrote that the "Senate should quit stalling, start voting." "Rehnquist's focus on the backlog" of judicial nominees "ought to be the catalyst to speed up the process. His directives are sound. ... No one is served by a lengthy wait to get to trial, an obvious outcome of inadequate numbers of judges. In addition, permitting the burden of a case overload to fall on current sitting judges is unwise. Sen. Orrin Hatch...lays the blame on the Clinton Administration for offering 'activist' candidates for the judiciary. 'Activist' by whose standards? Regardless, the nominees deserve a vote."

**The Charleston (SC) Post and Courier (1/5)** wrote that while "Chief Justice William H. Rehnquist's sharp criticism of the Senate for delaying judicial nominations shouldn't have been all that unexpected," "it should be noted that no apocalyptic breakdown of justice is imminent." "The Republicans could as easily counter" Clinton's claims that they're "playing politics" by asserting "that justice is their concern since the proper role of a judge is at the center of the debate between the President and the Senate. ... The request for more judicial resources seemingly has merit. ... But that is not the whole story. As Sen. Hatch pointed out to the (NY) Times, the extra judicial workload has been accommodated by bringing in retired judges. Still, the Chief Justice is right in warning Congress it cannot go on enlarging the Federal jurisdiction without funding more judges. And he is surely right in asking that the Senate fulfill its duty to vote up or down on the President's nominees without subjecting them to endless delay."