



Reuters/ Jonathan Ernst – Senator Jeff Sessions (R-AL) (L) and Senator Pat Leahy (D-VT) preside over the Senate Judiciary Committee.

## **Do Judicial Emergencies Matter? Nomination and Confirmation Delay during the 111<sup>th</sup> Congress**

**Russell Wheeler and Sarah Binder**

Last month, Senate Judiciary Committee Chair Patrick Leahy highlighted a “rise in judicial vacancies . . . and an increasing number of judicial emergencies.” “Judicial vacancies” is a fairly obvious term: judgeships without incumbents. In contrast, “judicial emergencies” is a fairly obscure term—one that has been described inaccurately or imprecisely in press accounts of judicial confirmation battles. The federal judicial system actually recognizes two types of judicial emergencies—emergency districts and emergency vacancies—which observers often fail to distinguish. This brief paper defines both types of emergencies, and then explores the impact of emergency vacancies on patterns of nominations and confirmations in the most recent Congress (2009-2010). Despite the judiciary’s effort to flag the vacancies it believes are most in need of filling, there is only limited evidence that the White House and the Senate—so far—have paid special attention to these emergency vacancies.



**Russell Wheeler** is a visiting fellow in Governance Studies at the Brookings Institution and president of the Governance Institute.

## What is a “Judicial Emergency?”

Emergency districts: The first type of emergency, rarely invoked, describes a judicial district whose chief judge has ordered a 30-day suspension of the Speedy Trial Act’s time limit for bringing criminal cases to trial, with a potential additional 12 months suspension by the circuit judicial council. Vacancies and an influx of border prosecutions, for example, led the chief district judge in Arizona to declare a 30-day emergency on January 21, 2001, which the Ninth Circuit Judicial Council extended for 12 months. There have been only a handful of these district emergencies since Congress authorized them in 1980.

Emergency vacancies: The second, and more common, type of judicial emergency is a designation that the federal judiciary applies automatically to vacant judgeships based on stated criteria:

- a vacancy on a court of appeals is an “emergency” if the court’s “adjusted filings” (essentially, the number of cases filed) per three-judge panel exceed 700 or are between 500 to 700 per panel and the vacancy has lasted at least 18 months;
- a vacancy on a district court is an “emergency” if the vacancy is on a court with two or more judgeships that has only one judge in active service, or if the court’s “weighted filings” exceed 600 per judgeship, or are between 430 and 600 and the vacancy is at least 18 months old (“weighted filings” is a composite figure reflecting the relative time needed to dispose of different types of cases). (In 2010, the Central District of California’s 602 weighted filings per judgeship was the 14<sup>th</sup> highest among 94 districts. The Southern District of Alabama’s 424 weighted filings per judgeship ranked 50<sup>th</sup> in the country. The District of Arizona’s weighted filings—653 per judgeship, ninth in the country—are high enough that Chief Judge John Roll’s



**Sarah Binder** is a senior fellow in Governance Studies at the Brookings Institution and professor of political science at George Washington University.

judgeship became a judicial emergency immediately upon his January 8 murder.)

Judicial emergencies have increased since President Obama took office, when there were 18 judicial emergencies—eight of 13 appellate vacancies and 10 of 40 district vacancies. By December 2010, there were again eight appellate emergencies (of 16 vacancies) but 36 district emergencies (of 79 vacancies). Those figures rose by mid-February 2011 to nine appellate emergencies out of 17 vacancies and 40 district emergencies out of 84 vacancies.

All emergencies are not created equal. First, “adjusted [appellate] filings” are a crude measure of work—basically raw filings with a discount for cases in which appellants represent themselves (including many prisoners). Thus, the actual workload in one court, in terms of the aggregate difficulty of the caseload, may vary from that of another, but vacancies in both courts get the “emergency” designation if they meet the adjusted filings criteria. However, there is a plausible case that any appellate vacancy in 2011 is a *de facto* emergency because Congress has not increased the number of appellate judgeships since late 1990; since then filings per appellate judgeship have risen 33 percent.

Second, the calculation for district judgeship emergencies uses sophisticated case weighting but does not account for the work performed by senior and visiting judges. A single emergency vacancy in a large district in which the recently retired judge is carrying a full caseload is a different emergency than those in the Central District of Illinois, for example, where three of its four judgeships are vacant. According to the *Washington Post*, the chief judge commutes 90 miles between courthouses and relies on senior judges, including two in their eighties, to cover cases.

## Where are the Judicial Emergencies?

Emergencies do not occur uniformly throughout the federal courts. Table 1 shows, by circuit, all district and appellate vacancies, and all judicial emergencies, that were in place at some time during the Obama administration’s first two years. Although there is no obvious reason to believe that circuits as geographic entities would affect the comparative number of vacancies and emergencies, the circuit provides a point from which to see variations.

Vacancies as a percent of district judgeships ranged from 10 percent in the districts of the First circuit (New England) to 30 percent in those of the Seventh circuit (Illinois, Indiana, Wisconsin). Emergencies as a percent of judgeships were also highest in the Seventh circuit, but were also comparatively high in the districts of the Fifth circuit (Louisiana, Mississippi, Texas) and the Eleventh (Alabama, Florida, Georgia). Further inquiry could reveal whether those districts rank very high in weighted caseload per judgeship or had relatively high weighted caseloads combined with long-standing vacancies or had only one active judge.

In the courts of appeals, emergencies in three circuits—the Second, Fourth, and Ninth—account for 13 of the 21 vacancies in place at some point in 2009-10.

**Table 1—Vacancies and Emergencies as a Percentage of Judgeships, by Circuit**

CIRCUIT	DISTRICT COURTS			COURTS OF APPEALS		
	J'ships	Vacancies (% of Jships)	Emerg's (% of Jships)	J'ships	Vacancies (% of Jships)	Emerg's (% of Jships)
1	29	3 (10%)	0	6	1 (17%)	1 (17%)
2	62	10 (16%)	5 (8%)	13	5 (38%)	5 (38%)
3	59	11 (19%)	3 (5%)	14	2 (14%)	2 (14%)
4	56	14 (25%)	4 (7%)	15	5 (33%)	4 (27%)
5	83	12 (14%)	10 (12%)	17	2 (12%)	2 (12%)
6	62	8 (13%)	1 (2%)	16	2 (13%)	1 (6%)
7	47	14 (30%)	9 (19%)	11	2 (18%)	0
8	42	9 (21%)	3 (7%)	11		0
9	110	22 (20%)	11 (10%)	29	4 (14%)	4 (14%)
10	39	7 (18%)	2 (5%)	12	2 (17%)	0
11	69	11 (16%)	8 (12%)	12	2 (17%)	2 (17%)
DC	15	4 (27%)	0	11	2 (18%)	0
FED				12	3 (25%)	0
ALL	673	125 (19%)	56 (8%)	179	32 (18%)	21 (12%)

## Publicizing Emergencies

No doubt the United States Judicial Conference created the “judicial emergency” classification and posts emergencies on the federal court website to draw special attention from the White House and Senate. On a formal level, however, neither the Conference nor its Administrative Office highlights these vacancies, probably because the judicial branch has not thought it has a role, or even a right to intervene, in the nomination and confirmation process.

In his January 1, 2011, Year-End Report on the Federal Judiciary, Chief Justice John Roberts, Jr., while noting that “[t]he Judiciary must respect the constitutional prerogatives of the President and Congress,” prodded both to find a long term solution to the stalemate over filling vacancies, which, he said, “has created acute difficulties for some judicial districts.” He did not, however, use the term “judicial emergency,” even when commenting favorably on the confirmation of a nominee to one of them (in Eastern California).

Likewise, last November, when the Ninth circuit’s chief circuit judge, chief district judges, and judicial council wrote to the Senate and Judiciary Committee leadership urging faster confirmations, the letter stated only obliquely that some of

the vacancies “have been . . . declared ‘judicial emergencies.’” Although informal communications between judges and legislators may make more of the need to fill emergency vacancies, the courts call little explicit, formal attention to these vacancies.

## White House and Senate Responses

As detailed below, we find only limited evidence that the White House and the Senate pay special attention to emergency vacancies as compared to non-emergency judgeships.

### *Appellate emergencies:*

Table 2 shows the fate of court of appeals vacancies over the course of the 111<sup>th</sup> Congress. A number of trends are evident. First, the administration submitted a marginally higher percentage of nominations to fill emergency vacancies (81 percent) than it did to non-emergency vacancies (73 percent). But the difference is not statistically significant; it could well have occurred simply by chance. Second, once nominated, candidates were confirmed at a statistically significantly higher rate for emergency vacancies than for the others. Overall, some 62 percent of appellate judicial emergencies were filled compared to just 27 percent of other vacancies—a statistically significant difference.

**TABLE 2—Circuit Vacancies Announced or Created and Nominations Submitted and Confirmed in the 111<sup>th</sup> Congress—Total and Judicial Emergencies Only**

COURT OF APPEALS VACANCIES	Vacancies	Nominations		Vacancies
		submitted	Confirmations	filled
All vacancies	32	25 (78%)	16 (64%)	50%
Judicial emergencies	21	17 (81%)	13 (76%)	62%
Other	11	8 (73%)	3 (38%)	27%

### *District emergencies:*

Evidence of special urgency to fill district judicial emergencies is harder to find. Table 3 shows a slightly higher (and statistically significant) proportion of nominations to judicial emergency vacancies than to other vacancies (70 percent versus 57 percent). But even if the White House prioritized finding nominees for emergency vacancies, the Senate showed no such urgency. In fact, the Senate confirmed a lower percentage of nominees to emergency vacancies than to non-emergency judgeships (46 percent versus 67 percent). Overall, only 35 percent of district vacancies were filled in the last Congress, with little priority apparently

given to filling the most overburdened vacant judgeships.

**TABLE 3—District Vacancies Announced or Created and Nominations Submitted and Confirmed in the 111<sup>th</sup> Congress—Total and Judicial Emergencies Only**

DISTRICT COURT VACANCIES	Vacancies	Nominations		Vacancies
		submitted	Confirmations	filled
All vacancies	125	78 (62%)	44 (56%)	35%
Judicial emergencies	56	39 (70%)	18 (46%)	32%
Other	69	39 (57%)	26 (67%)	38%

### Other Factors Shaping Nominations and Confirmations

What other variables might account for which vacancies were more likely to receive nominations and which nominees were more likely to be confirmed? Here, we briefly explore some alternative factors, including the partisan makeup of the vacancy’s Senate delegation and the existence of a candidate-vetting committee.

#### *Senate delegation partisanship:*

Table 4 shows appellate nomination and confirmation rates by the partisanship of the Senate delegation. Vacancies in states with two Democratic senators got proportionately more (though not statistically significantly more) appellate nominations than those in states with two Republican senators and considerably more than those with mixed delegations. The differences in percentages of vacancies filled, however, are modest (and some of the numbers quite small).

**TABLE 4—Appellate Vacancies Announced or Created and Nominations Submitted and Confirmed in the 111<sup>th</sup> Congress—By Senate Party Representation**

	Vacancies	Nominations		Vacancies
		submitted	Confirmations	filled
All vacancies*	27	21 (78%)	15 (71%)	56%
Two Dem. Senators	13	12 (92%)	8 (67%)	62%
Two Rep. Senators	10	7 (70%)	5 (71%)	50%
Mixed delegation	4	2 (50%)	2 (100%)	50%

\* Totals do not match those in Table 2 because they exclude the District of Columbia and Federal Circuit appellate courts, which had five vacancies, four nominations, and one confirmation.

Table 5 shows the relationship of Senate delegation partisanship to the naming

and confirming of district nominees, both for emergency and non-emergency vacancies. Nominations were far more likely for vacancies in states represented by at least one Democratic senator. Of the 70 vacancies in states with two Democratic senators, 45 got nominations (64 percent), compared to 11 of the 26 vacancies (42 percent) in states represented by two Republicans. Emergency judgeship vacancies in states with two-Democratic senators also were more likely to gain a nomination compared to non-emergency vacancies (83 percent versus 50 percent). In states with two Republican senators, six of the 13 emergency vacancies, and five of the 13 non-emergency vacancies, got nominations. Not only did states with mixed Senate delegations attract proportionately more nominations (albeit fewer to judicial emergencies), nominees in these mixed-delegation states were also more likely than other nominees to be confirmed.

**TABLE 5—District Vacancies Announced or Created and Nominations Submitted and Confirmed in the 111<sup>th</sup> Congress—By Senate Party Representation**

	Vacancies	Nominations submitted	Confirmations	Vacancies filled
All vacancies*	121	74 (61%)	42 (57%)	36%
Two Dem. Senators	70	45 (64%)	22 (49%)	33%
Judicial emergencies	30	25 (83%)	11 (44%)	37%
Other	40	20 (50%)	11 (55%)	30%
Two Rep. Senators	26	11 (42%)	6 (55%)	23%
Judicial emergencies	13	6 (46%)	1 (17%)	8%
Other	13	5 (38%)	5 (100%)	38%
One Dem, One Rep.	25	18 (72%)	14 (78%)	56%
Judicial emergencies	13	8 (62%)	6 (75%)	46%
Other	12	10 (83%)	8 (75%)	46%

\* Totals do not match those in Table 3 because they exclude the District of Columbia district court.

The paucity of nominations in a few larger states account for much of the gap between vacancies and nominations. Maneuverings by these large-state senators in getting nominations to the White House may help explain the comparative dearth of nominations, for which the White House has been roundly criticized. For example:

For vacancies in the 20 states with two Democratic senators:

- Nine vacancies in New York (including five that occurred or were announced by September 2009) produced only two nominations, both late in 2010 (and both to judicial emergencies) and no confirmations.

- Seven Pennsylvania vacancies (four of which occurred or were announced in 2009 and one in early 2010) produced only three nominations, all of them late in 2010 (one to a judicial emergency) and no confirmations.
- By contrast, 14 vacancies in California (all but one from 2009) produced 10 nominations, nine by late May 2010, and six confirmations, including four to judicial emergencies.

For vacancies in the 12 states with two Republican senators, the lower nomination rates likely reflect the administration's difficulties in gaining Republican home state senators' approval of the White House's favored nominees. With those senators' potential objections backed by the threat of an unreturned Judiciary Committee "blue slip" — probably dooming the nomination — the White House likely backed off making nominations to those vacancies until it secured Republican support.

- Seven of the 26 vacancies in states with two Republican senators in the 111<sup>th</sup> Congress were in Texas; six occurred or were announced in 2009, one in early 2010. Six of them were in the border districts of Western and Southern Texas, which ranked third and sixth in the nation in weighted filings per judgeship. Only two of the seven received nominations in the 111<sup>th</sup> Senate (and both of those were in July 2010); the first of the two to be confirmed was in February 2011. The scant record probably reflects the reported feuding between Texas's two Republican senators and Texas House Democrats and the White House over nominees. Had all the Texas vacancies received nominations, the proportion of district judgeship emergencies with nominations in Table 3 would be 80 percent rather than the 70 percent shown.
- Arizona has three vacancies, all judicial emergencies. In addition to the Roll vacancy is one created by a district judge's December 2010 appointment to the court of appeals. Understandably, neither of those has a nomination pending. However, the third vacancy, also with no nominee, was created in August 2010 but the judge had announced his retirement plans in October 2009.
- By contrast, five vacancies in Georgia produced four nominations (two for judicial emergencies), although only one confirmation (to a non-emergency vacancy).

Vacancies in the eight mixed delegation states were most likely to receive nominations and confirmations. All three vacancies in Indiana (all judicial emergencies) are now filled. There may be something to be said for bi-partisanship.

### ***Vetting Committees:***

In the 111<sup>th</sup> Congress, legislators (mostly senators) in 20 states and the District of



Columbia used committees to vet individuals whom they might recommend to the White House for nomination, mainly for the district courts. A stated rationale for using committees is that nominees who have their stamp of approval (especially bipartisan committees) might get through the process more easily. However, as Table 6 shows, vacancies in states with committees did not proceed much differently than those in other states (conceding that nominees selected in states with vetting committees might not have been recommended by the vetting committee). States with vetting committees did not receive an appreciably higher level of nominations; nor were nominees to judgeships in such states more likely to be confirmed. That said, nominations in vetting states were disproportionately made to emergency vacancies than to non-emergencies. Still, the proportion of vacancies filled, and of judicial emergencies filled, is lower for vetting committee states overall.

**TABLE 6—Nomination and confirmation activity in vetting committee and other states**

DISTRICT COURT VACANCIES	Vacancies	Nominations submitted	Confirmations	Vacancies filled
All vacancies	125	78 (62%)	44 (56%)	35%
Vetting comm states	75	48 (64%)	25 (52%)	33%
Judicial emergencies	37	27 (73%)	11 (41%)	30%
Other	38	21 (55%)	14 (67%)	37%
Other states	50	30 (60%)	19 (63%)	38%
Judicial emergencies	19	12 (63%)	7 (58%)	37%
Other	31	18 (58%)	12 (67%)	39%

## Conclusions

To be sure, it is tough to draw definitive conclusions from a single Congress given the relatively small numbers of vacancies and nominees involved. Still, this fairly simple analysis suggests that the priorities of the federal judiciary do not bear heavily on the work of the White House in finding nominees or on the work of the Senate in confirming them.

We do find some limited evidence that the White House and Senate singled out appellate judicial emergencies for expedited treatment during the first two years of the Obama administration. Still the administration’s greatest area of success in filling judicial vacancies was apparently in securing confirmation of nominees in states with Democratic senators; the White House seems to seek the path of least resistance in pursuing confirmation of its nominees. In sum—and recognizing individual exceptions—the priority the Judicial Conference attaches to filling judicial emergencies was not shared (at least with regards to the district courts) in 2009-2010 by the administration in making nominations or by the Senate in

confirming them (and probably not by legislators in recommending nominees). That dissonance may reflect the Judicial Conference's reluctance to do more publicly to advertise emergencies beyond posting them on the federal courts' website. That reluctance to engage directly in battles over advice and consent may indeed be a wise one from the perspective of the judiciary's institutional independence but less so in terms of filling vacancies.

**Governance Studies**

The Brookings Institution  
1775 Massachusetts Ave., NW  
Washington, DC 20036  
Tel: 202.797.6090  
Fax: 202.797.6144  
[www.brookings.edu/governance.aspx](http://www.brookings.edu/governance.aspx)

**Editor**

Christine Jacobs

**Production & Layout**

John S Seo

**E-mail your comments to  
[gsccomments@brookings.edu](mailto:gsccomments@brookings.edu)**

*This paper is distributed in the expectation that it may elicit useful comments and is subject to subsequent revision. The views expressed in this piece are those of the author and should not be attributed to the staff, officers or trustees of the Brookings Institution.*