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EXEC. UFG. PRESIDENT
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THE WHITE HOUSE

WASHINGTON

August 15, 2002

MEMORANDUM FOR

DAN BARTLETT
NICK CALIO
JUDGE GONZALES
KARL ROVE
TIM FLANIGAN
TIM GOEGLEIN
HEATHER WINGATE
ANNE WOMACK

FROM:

BRETT KAVANAUGH

RE:

American Bar Association Resolution

*Susan
make certain
Tim completes the widely
asked give a copy to
Ken and Barry for
their dissemination.*

This week, the American Bar Association's House of Delegates passed a strong resolution on the judicial confirmation process. The resolution and accompanying report are attached.

The resolution provides that the "Senate Committee on the Judiciary should promptly act on nominees" and "the Senate of the United States should promptly advise and consent to or reject the nominees." The report accompanying the resolution states that "the federal courts [] suffer, and so does the rule of law" as a result of current delays in the judicial confirmation process. The report specifically references the President's May 9, 2001, nominees. The report also refers to what it terms an "emergency situation" in the federal courts and states: "Vote them up or down, but don't hang them out to dry."

**AMERICAN BAR ASSOCIATION
KENTUCKY BAR ASSOCIATION
SECTION OF LITIGATION
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS**

REPORT TO THE HOUSE OF DELEGATES

RECOMENDATION

RESOLVED, that the prompt filling of existing judicial vacancies in the federal courts of the United States is essential for the efficient, responsible, and effective administration of justice; and that undue delays in the nomination and confirmation of candidates for vacancies in the federal courts of the United States adversely affects such effective, responsible and timely administration of justice;

FURTHER RESOLVED, that the American Bar Association urges the following:

1. The president of the United States should promptly nominate candidates to fill vacancies in the federal courts of the United States.
2. The Senate Committee on the Judiciary should promptly act on nominees,
3. The Senate of the United States should promptly advise and consent to or reject the nominees.

FURTHER RESOLVED, that the American Bar Association urges its members and state, local and territorial bar associations to encourage the President to make prompt appointments to fill federal judicial vacancies and to contact the appropriate members of the Senate to urge prompt hearings and votes on pending nominations for the federal courts of the United States.

REPORT

Introduction

This report will be short on rhetoric and long on statistics. The number of judicial vacancies in the federal courts was termed "alarming" by the Chief Justice of the United States in his 2001 Year-End Report on the Federal Judiciary.¹ President George W. Bush, a Republican, began making judicial nominations on May 9, 2001. The Senate, controlled since June 2001 (after reorganization) by the Democrats, was responsible for the confirmation process. This process includes control of the setting of hearings at the Senate Judiciary Committee and control of the calendar of consent proceedings in the United States Senate as a whole. As noted by the Chief Justice, "When the Senate adjourned on December 20th [2001], 23 court of appeals nominees and 14 district court nominees were left awaiting action by the Judiciary Committee or the full Senate."²

The Present State of Affairs

Since the beginning of this year, the same delay in holding hearings and acting upon the nominees has continued: By July 19, 2002, President Bush nominated (or

¹ Hereinafter referred to as "2001 Year-End Report."

² Ibid. at p. 3.

renominated) a total of 113 prospective Article III judges,³ 59 of whom have been confirmed by the Senate. Here is the complete breakdown on pending nominations as of July 19, 2002:

- Total nominations pending before the Senate:
 - 21 Circuit Court
 - 32 District Court
 - 4 Claims Court
 - 1 International Trade Court.
- Nominations pending before the Senate Judiciary Committee awaiting a hearing:
 - 16 Circuit Court
 - 19 District Court
 - 4 Claims Court
 - 1 International Trade Court.
- Nominations pending before the Senate Judiciary Committee awaiting a vote:
 - 1 Circuit Court
 - 5 District Court
- Nominations scheduled for a hearing:
 - 0 Circuit Court

³ Also nominated were four nominees for the U.S. Court of Claims and one for the International Trade Court.

- 0 District Court
- 0 Claims Court
- Nominations pending before the full Senate awaiting a vote:
 - 3 Circuit Court
 - 12 District Court
- Nominations Confirmed by the Senate:
 - 11 Circuit Court
 - 48 District court.⁴

As of July 19, 2002, there were 91 existing Article III federal judicial vacancies.

Of these 91 vacancies, 29 are circuit seats and 62 are district seats. These 91 vacancies constitute 10.6 percent of the federal judiciary. Thirty-five of the 91 vacancies are so-called "judicial emergency" vacancies. Twenty-six nominees pending are for positions designated as "judicial emergency" vacancies.⁵ Nothing has changed.

Indeed, data recently released by the bipartisan Constitution Project at Georgetown University and Professor Wendy Martinek of Binghamton University, points out that in the first year of President George W. Bush's term in office, successful

⁴ Figures are taken from the website of the U. S. Department of Justice's Office of Legal Policy. For a review of that site and the information on federal judicial vacancies and confirmations, see www.usdoj.gov/olp/judicialnominations.htm.

⁵ The formulation by which a judicial vacancy is determined to be a "judicial emergency" is quite convoluted: In its simplest format any court with more than one authorized judgeship and only one active judge has a "judicial emergency."

nominees took an average of 112 days from nomination to confirmation. On May 9, 2002, the anniversary of his first judicial nominations, President Bush met with members of the Senate Judiciary Committee to take stock of the situation. Of the 11 circuit court nominees who were named 365 days previously, only 3 had been granted hearings at the Senate Judiciary Committee. Nothing came of the meeting.⁶ Those 8 have still not had hearings.⁷ By July 19, 2002, President Bush had nominated 32 individuals to serve on circuit courts, but only 11 were confirmed, for a confirmation rate of less than 35 percent. Finally, there are more judicial vacancies today than when President Bush took office.

⁶ White House Press Release, May 9, 2002.

⁷ See footnote 4 above.

The Damage

The purpose of this Report and Resolution is not to excoriate either Democrats or Republicans; as the Chief Justice has pointed out, in the second term of President Clinton, a Democrat, the Senate, then controlled by Republicans, confirmed only 17 judges in 1996 and 36 in 1997.⁸ The fact is that whoever may bear responsibility for delays in the process, it is the federal courts that suffer, and so does the rule of law. As noted recently by Senator Arlen Specter in a published letter in *Legal Times*, "filling vacancies is the most pressing issue facing our lower courts – due to the correlation between judicial vacancies and delays in processing cases."⁹ The Senator goes on to cite examples of hardship arising from the present situation:

- 50% vacancy rate on the 6th Circuit Court of Appeals, resulting in a death penalty appeal left pending for eight years, and a plaintiff in a civil case dying after having waited more than 15 months just to have an oral argument in a job discrimination suit.
- More than a quarter of the seats vacant in the 4th Circuit court of Appeals despite four declared judicial emergencies and one seat vacant for eight years. A municipality in South Carolina is waiting 39 months for clarification of the constitutionality of a municipal ordinance. A maritime Longshoremen's Act claim has been pending for 38 months.¹⁰

⁸ See Report of the Chief Justice, 1997 Year End Report on the Federal Judiciary at p. 8..

⁹ Senator Arlen Specter, "Let's Agree on a Timely Basis," Legal Times, July 8, 2002.

¹⁰ Ibid.

A real possibility arising from the often lengthy and unpleasant nature of the confirmation process is that successful lawyers in private practice will become reluctant to serve. As the Chief Justice notes, "for lawyers coming directly from private practice, there is both a strong financial disincentive and the possibility of losing clients in the course of the wait for a confirmation vote."¹¹ We simply cannot lose this component from the reservoir of available and willing candidates for judicial office. In the words of the Chief Justice, "The Senate ought to act with reasonable promptness and to vote each nominee up or down. The Senate is not, of course, obliged to confirm any particular nominee. But it ought to act on each nominee and to do so within a reasonable time."¹² We respectfully agree: Vote them up or down, but don't hang them out to dry.

Prior House of Delegates Action

As noted above, the situation arising from the state of judicial vacancies is not unique to our time, and the House has dealt with it previously: In February 1990, at its Mid-Year Meeting, the House passed Report No. 8F, sponsored by the Virgin Islands Bar Association and the Standing Committee on Judicial Selection, Tenure, and Compensation. The Resolution, inter alia, urged "the President of the United States to expedite the appointment to vacancies existing in the United States judicial system and that the Senate take prompt action in considering confirmation of such nominees."

¹¹ 2001 Year-End Report, p. 4.

In 1998, at the Mid-Year Meeting, the House passed Report No. 8A, sponsored by numerous bar associations and Sections. The Resolution, inter alia, urged, "the President of the United States promptly to advance nominations for current vacancies for federal judicial positions and the Senate of the United States to hear and vote on those nominations in an expeditious manner."

In October of 1997, at a meeting of the Board of Governors attended by Senator Patrick Leahy, now Chairman of the Senate Committee on the Judiciary, the Board approved the following Resolution:

Resolved, That the Board of Governors of the American Bar Association, which includes members of both political parties, urges the United States Senate promptly to hear and vote on pending nominations for United States District Courts and Courts of Appeal.

Further Resolved, That such action is essential for the effective and efficient administration of justice in the United States.

The present report recognizes the existence of the prior actions by the House and the Board of Governors. We believe, however, the present resolution is required by the emergency situation existent in the federal courts. In addition, the present resolution focuses with greater emphasis on the role of the Senate Committee on the Judiciary as a cause of the blockage in the confirmation process: The notion that that Committee, by the simple expedient of refusing to hold timely hearings may avoid confirmation proceedings

¹² Id. At p. 3.

in the full Senate, is simply unacceptable to our notion of an appropriate and constitutional nomination process.

Finally, this resolution is presently timely because Report No. 112, which will be considered by the House at the August 2002 Session, and presented by ABA member C. Boyden Gray, contains unsatisfactory language which can only be overcome by House approval of the present resolution. The most unacceptable portion of the Gray Report is its insistence upon urging that the Senate Committee on the Judiciary clear nominees for a full Senate vote within a specific time period. We believe that urging such a requirement upon a full committee of the Senate by the ABA is, to say the least, presumptuous. Note that Senator Specter, in the protocol he would require of the Senate Committee requests precisely such a time limitation. We believe Senator Specter's proposal is a reasonable one for a United States Senator who is himself a Member of that Committee.