

United States Senate
OFFICE OF THE REPUBLICAN LEADER

June 25, 2012

Mr. William T. (Bill) Robinson III
President
American Bar Association
321 North Clark Street
Chicago, Illinois 60654

Dear Mr. Robinson:

We were surprised to receive your letter of June 20, 2012 urging, for the first time, confirmation of particular circuit court nominees despite the existence of the Leahy-Thurmond Rule. By any objective measure—overall circuit court vacancy rate, vacancies on the respective circuit courts, or judicial emergency designation—our appellate courts are doing at least as well, and in most respects much better, now than when our democratic colleagues invoked the Rule both times during the last administration. Given this exceptionally fair treatment of President Obama’s judicial nominees, it is curious that your organization would choose now to urge the Senate not to follow its practice of suspending the processing of circuit court nominations in the months preceding a presidential election. This unprecedented action raises questions about the American Bar Association’s objectivity and neutrality.

While the circuit court vacancy rate in June 2008 was the same as it is now, there were twice as many judicial emergencies in the circuit courts at that time. The Fourth Circuit Court of Appeals, in fact, was in crisis. Fully one-fourth of its seats were empty, even though the prior administration had nominated outstanding individuals to fill them. Despite the crisis facing the Fourth Circuit in June of 2008, our democratic colleagues refused to process any of President George W. Bush’s four, well qualified nominees.

For instance, the Senate twice had unanimously confirmed Judge Robert Conrad to the important positions of United States Attorney and federal district court judge. By this time in June of 2008, his nomination to the Fourth Circuit had been pending for 344 days. Our democratic colleagues refused to process his nomination, notwithstanding support from home state senators, a unanimous well qualified rating from your organization, and – in contradistinction to any of the three nominees mentioned in your letter – the Administrative Office of the U.S. Courts had declared the vacancy to which he was nominated to be a judicial emergency.

Senate democrats refused to process three other qualified nominees to the Fourth Circuit. Steve Matthews had support from home state senators, and by this time in 2008, had been pending for 293 days. Judge Glen Conrad had been confirmed to the district court in 2003 by the unanimous vote of 89-0. Both home state senators, one republican and one democrat, strongly supported his nomination. Rod Rosenstein, the then and current U.S. Attorney for Maryland, also would have filled a judicial emergency on the Fourth Circuit. Nonetheless, democrat home state Senators blocked his nomination—incredibly—for the reason that he was doing a “good job” as U.S. Attorney and “that’s where [they] need him.”

Our democratic colleagues' record with respect to these nominees was so abysmal that even the *Washington Post* editorial board called them to task, writing, "[T]he Senate should act in good faith to fill vacancies—not as a favor to the president but out of respect for the residents, businesses, defendants and victims of crime in the region the 4th Circuit covers." The ABA, by contrast, said nothing when Senate democrats invoked the Leahy-Thurmond Rule and stopped processing circuit court nominations in June of 2008. These outstanding nominees, along with others like Peter Keisler—who by this date in June of 2008 had been bottled up in committee for an astonishing 727 days—did not merit any special consideration by the ABA in the months preceding the last presidential election.

The situation on our circuit courts was equally dismal in June of 2004 when President Bush was concluding his first term in office. The overall vacancy rate on our circuit courts was much higher than it is now. And the Sixth Circuit, like the Fourth Circuit in 2008, was in crisis, with fully one-fourth of its seats empty, even though the prior administration had nominated qualified individuals to fill those vacancies as well. And as in 2008, the ABA said nothing when our democratic colleagues cited the Leahy-Thurmond Rule – this time to justify filibustering several circuit court nominees in the months preceding the 2004 presidential election.


The ABA presents itself to the public as a non-partisan, professional organization. However, it has chosen to advocate for this Administration's circuit court nominees in the few remaining months before this presidential election, when it chose not to do so before either of the last two presidential elections despite much more compelling circumstances. This sort of selective advocacy is precisely why so many people question the ABA's professed neutrality.

We will continue to work with the senate majority to process judicial nominations, consistent with the practices of the Senate—practices strongly defended by our Democratic colleagues during the previous administration and about which the ABA said nothing. Indeed, the Senate will vote on another judicial nomination tomorrow. If confirmed, that will be the 151st lower court confirmation already for this Administration, in addition to two Supreme Court nominations—a confirmation total far greater than what was achieved under comparable circumstances during the last administration. We hope that in the future the ABA will take a balanced approach to assessing the judicial confirmation process in the Senate.

Sincerely,



MITCH McCONNELL
REPUBLICAN LEADER
UNITED STATES SENATE



CHUCK GRASSLEY
RANKING MEMBER, JUDICIARY COMMITTEE
UNITED STATES SENATE

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