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Recommended Citation

Roger Williams University School of Law, "Newsroom: Goldstein On Judicial Nomination Delays" (2010).
Life of the Law School (1993-). 95.
https://docs.rwu.edu/law_archives_life/95

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Newsroom

Goldstein On Judicial Nomination Delays

RWU Law Professor Jared Goldstein speaks with ProJo columnist Ed Fitzpatrick about delay of judicial nominations in the U.S. Senate.

From Ed Fitzpatrick's [Providence Journal](#) column of November 11, 2010:

U.S. Sen. Sheldon Whitehouse flew to Washington on Tuesday to sit in the presiding officer's chair in the Senate. But he wasn't there for long.

Moments after calling the chamber to order, he adjourned the Senate. And, by Tuesday night, he was back in Rhode Island, explaining that he and other Democrats are staffing "twice-a-week pro-forma Senate sessions" to preserve President Obama's judicial nominations, including the nomination of Providence lawyer John J. McConnell Jr. to the U.S. District Court for Rhode Island.

"There is a Senate rule that says if you are out more than 30 days, all nominees go back to the president," Whitehouse said during a panel discussion on the politics and process of judicial confirmations.

"Historically, what has happened is that rule is waived by unanimous consent, as just a matter of ordinary courtesy."

But Republicans are no longer extending that courtesy, and they're threatening to filibuster nominees, he said.

Whitehouse, a Judiciary Committee member, said 41 circuit and district judges have been confirmed since Mr. Obama took office, compared with 78 judges at this point in President George W. Bush's tenure.

While it's a given that Supreme Court nominations are part of a "political war," that battle has been creeping down to Circuit Courts, and we're at a "tipping point" where it might extend to District Court nominees, he said.

McConnell "has the support of both of his senators from the home state, he passed out of the committee with a bipartisan vote and cleared all of his background checks," Whitehouse said. "If somebody in that position is going to be filibustered, then you have let a very big tiger out of a cage, and trying to get that tiger back in the cage is going to be very, very hard."

(McConnell is also a major contributor to the Democratic Party and a leading plaintiffs' lawyer who has drawn opposition from the U.S. Chamber of Commerce.)

In January, the Senate might consider rule changes "to limit the application of the filibuster with respect to district judges," Whitehouse said during the event, presented by the Rhode Island Lawyer Chapter of the American Constitution Society and Common Cause Rhode Island.

Senior U.S. District Judge Ernest C. Torres said he was confirmed in 1987, less than six months after being nominated by President Ronald Reagan. By contrast, he noted, President Bush nominated Magistrate Judge Lincoln D. Almond to the District Court and District Judge William E. Smith to the 1st U.S. Circuit Court of Appeals in 2007, but the Senate (including Whitehouse and Sen. Jack Reed) took no action. And now, McConnell's nomination is facing delays.

So, Torres said, "There is evidence the process has become much more protracted and contentious," and "to the extent this becomes commonplace or a political game, it perpetuates the tit-for-tat mentality that causes the delays to occur again."

But **Roger Williams University law Prof. Jared A. Goldstein** said politics has always been part of the process. For instance, he said, President John Tyler had four Supreme Court nominees in a row rejected for political reasons.

So to summarize the state of American judicial selection: Tit-for-tat and Tyler, too.

For full story, click [here](#).