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July 30, 2018

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Ranking Member, Committee on Homeland Security & Governmental Affairs
United States Senate
503 Hart Senate Office Building
Washington, DC, 20510

Honorable Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Honorable Chuck Schumer
United States Senate
322 Hart Senate Office Building
Washington, DC, 20510

Dear Senators,

As President of the Council for Court Excellence (CCE) and former Attorney General of the District of Columbia, I write to express our organization's significant concern regarding the overwhelming number of judicial vacancies in the District's local courts and to urge your Committee and the full Senate to move forward with confirming the highly qualified nominees for positions on the D.C. Superior Court and Court of Appeals.

For 36 years, CCE has played an active role in improving justice for all members of the District of Columbia community. CCE is a nonprofit, nonpartisan civic organization originally founded to carry out recommendations highlighted by a comprehensive report by the District of Columbia Court System Study Committee of the D.C. Bar in 1982. Our mission is to enhance the justice system in the District to serve the public equitably. We have had substantial success in improving the administration of justice at the local and federal levels through countless civil and criminal law reform initiatives, advocacy for children in the justice system, and innovations in jury service and access to justice. Our Board of Directors – which includes lawyers, business people, judges and members of the

civic community – works passionately to secure a better justice system for all District of Columbia residents. We have had no role in the selection of judicial nominees whose confirmations have been delayed.

Nine of the D.C. Superior Court's 62 judgeships have been vacant for some time, and a tenth vacancy is expected in September resulting from the retirement of Judge John Mott, meaning this busy trial court's capacity will be diminished by nearly 18 percent. In addition, there are currently two unfilled judicial positions at the D.C. Court of Appeals. The oldest Court of Appeals vacancy is Judge Oberly's seat, which has been unfilled since November of 2013. These positions are not Article III, lifetime-tenure federal judgeships; they serve our local trial and appellate courts for 15-year terms and are intended to ensure justice for the District of Columbia's 700,000 citizens. As detailed below, these vacancies are negatively impacting the efficiency of the justice system, which has significant negative implications for our justice-seeking citizens and judges alike.

The persistence of the current situation is equally disconcerting as the numbers outlined above. Delays in the Senate's confirmation of nominees has been evidenced for the past five years. In 2015, CCE expressed similar concern for the issue at hand, at which time the Senate had not confirmed a judge to the Superior Court for two and a half years. Despite the recent confirmation of Ms. Kelly Higashi earlier this month, six nominees are still pending to fill vacancies in the D.C. Superior Court. Only one of these additional nominees has yet to receive a hearing or even have a hearing scheduled. Three of these nominations have been pending since 2017; similarly, in the Court of Appeals, a nominee has been awaiting Senate confirmation for more than a year. While Ms. Higashi's confirmation reflects a step in the right direction, it alone does not get close to alleviating the burden on the courts and D.C. residents.

In a 2011 report, CCE reviewed the judicial nomination process in the District. According to established procedures, the Judicial Nomination Committee (JNC) submits three proposed nominees to the President within 60 days of a vacancy arising. The president then has 60 days to select a nominee to send to the Senate to be confirmed. If the President does not make a selection within these 60 allotted days, it is the responsibility of the JNC to do so. Once nominees are sent to the Senate, however, there is no time frame to regulate the duration of the confirmation process. Among the findings of CCE's report was that delays in the Senate's confirmation process were the primary cause of delays in filling judicial vacancies in District of Columbia courts. For the reasons outlined below, CCE believes it is imperative to the well-being of the District of Columbia that the Senate address this issue.

First and foremost, trial judges are burdened by additional workload. Judges in the Superior Court are currently tasked with taking on additional dockets, which delays them from moving forward on their own existing cases. Not only does this affect sitting judges, it impedes due process for all litigants involved. This effect is exacerbated when an existing judge is unavailable due to illness. The result of these increased burdensome and time-consuming demands is the postponement of justice for all parties.

Similarly, judges in the D.C. Court of Appeals experience increased caseloads when long-standing vacancies remain unfilled. Normally sitting in panels of three, judges are tasked with hearing additional cases and providing more written opinions per judge. Vacant judgeships are particularly problematic in *en banc* cases, where the total number of judges is even, rather than odd, and a decisive vote cannot be reached. As representatives of the court, judges do more than preside over trials and appeals; they contribute to the effective management of the courts, including serving on committees, managing divisions, and managing specialized courts. Understaffed courts are thus problematic for our judges, whose duties become unnecessarily copious. Court of Appeals staff estimate that these two vacancies delay the consideration of approximately 100-200 cases per year, as fewer judicial panels can be constituted overall.

Finally, we are concerned that the prolonged delays in the confirmation of judicial nominees will dissuade highly qualified candidates – particularly from the private sector – from applying for judgeships in the future. Such a drawn out confirmation process asks they put their professional lives on hold, a demand that is counterproductive both to lawyers and their clients. This is ineffectual to recruiting and maintaining a competent, diverse, and committed bench in our D.C. courts.

For the reasons outlined above, we respectfully ask that you take measures to mobilize your Committee to complete the confirmation of pending judicial nominees so these vacancies can be filled promptly. Although the Council for Court Excellence does not regularly get involved in Senate confirmations, the situation at hand is of such urgency that we felt it our duty to share our opinion on the issue. Citizens of the District of Columbia expect and deserve a justice system that operates in a timely, fair and just manner. Their continued faith in the justice system is critical to its success.

Thank you for your consideration.

Sincerely,



Irvin B. Nathan
President
Council for Court Excellence