

Judicial Nominations Process: Q & A

Who nominates individuals to fill lifetime seats on the federal courts?

The sitting US President has the constitutional authority to nominate individuals to fill federal judicial court vacancies with the “advice and consent” of the US Senate. The term “advice and consent” means that senators typically help identify and recommend individuals for nomination to fill judicial vacancies in district and circuit courts in their states.

How do vacancies arise?

Federal court appointments are for life. Some judges do serve until the end of their lives, but each judge is free to make an individual decision about when to step down. When a judge gives notice of her or his intent to step down from the judgeship, a future vacancy is created. A current vacancy is created on the date a judge officially retires from regular active status. Once retired, the judge may move from active status to senior status. Senior status judges continue working with the option of reducing their case load.

How does the confirmation process start?

After a judge gives notice of her or his intent to step down or a vacancy is otherwise created, the White House traditionally consults with the “home state senators” (the senators who represent the state where the federal vacancy occurs) for candidate recommendations. After a candidate is successfully vetted by the White House, the President formally announces the nomination and sends it to the US Senate. The nomination first goes to the Senate Judiciary Committee, where the nominee’s background is investigated again and a “blue slip” is sent to each home state senator. A blue slip is a courtesy notice that gives the home state senators the opportunity to sign off on committee consideration of the nominee, though some Judiciary Committee chairs require blue-slip approval before proceeding on the candidate’s nomination.

Once the blue slips are returned, the Judiciary Committee schedules a hearing where the nominee is introduced (usually by the home state senators). The nominee makes a presentation and answers questions from the senators on the committee. Committee members may send written follow-up questions to the nominee. Interested parties may submit testimony for the record and are sometimes invited to testify in person before the committee. Following the hearing, a committee vote is scheduled. The nominee is either approved or rejected by the Judiciary Committee based on a majority vote.

What is the confirmation process in the full Senate?

Once a nomination is sent to the full Senate, a vote is scheduled preceded by debate on the nominee. Under Senate rules it takes 60 votes to invoke cloture to cut off debate and move toward a vote on any issue. However, in November 2013, responding to unprecedented obstruction and regular filibusters, the Senate voted to make a procedural change in cases of nominations to district and circuit courts and the Executive Branch. The change allowed a simple majority (51 votes) to invoke cloture on these nominees. And, in April 2017, Senate Majority Leader Mitch McConnell (R-KY) invoked the so-called “nuclear option” to apply this new rule to US Supreme Court nominees, as well. (It was through this procedure that now-Associate Justice Neil Gorsuch was confirmed.) Once cloture is invoked, confirmation requires a simple majority of the Senate.

Have the White House and/or Senate leadership ignored any norms and customs in order to hastily confirm judges that follow a certain agenda?

Unfortunately, yes. The Trump White House has removed the American Bar Association’s objective assessment and rating from its vetting process. This means that it is making recommendations to the Senate regarding judicial nominees before this confidential assessment of competence, integrity, and temperament is even complete. Similarly, the Trump White House has made several nominations without first consulting with home-state senators, as is custom, thus depriving those senators of their “advice and consent” duties. Lastly, Senate Judiciary Committee Chairman Chuck Grassley (R-IA) has threatened that he may not continue to honor blue slips for circuit court nominees, despite the custom for the last century.

How have delay tactics impacted the judicial nominations process and the federal courts in the past?

Throughout President Obama’s 8 years in office, there were an unprecedented number of filibusters and general delays on judicial nominees in an effort to keep vacancies open (and filled by another president). While the shameful blockade of the nomination of Judge Merrick Garland to the Supreme Court is the most widely-known example, many nominees to the lower courts were blocked, as well.

For example, when President Obama assumed office, there were 55 judicial vacancies, and when he left, there were 114. At the end of President Obama’s second term, 54 judicial nominations were still pending. 25 of those nominees had made it through the Judiciary Committee and were pending on the Senate floor; 29 had not yet received a hearing in the Judiciary Committee. Judge Garland numbered among those 29. At the end of 2016, those 54 nominations expired.

Does NCJW support a single-issue “litmus test” for judges?

No. Other than professional credentials, moral character, and judicial temperament, a basic qualification for a judge is that she or he be independent and committed to upholding constitutional rights, including the rights to privacy, equality, religious freedom, and individual liberties. Federal judges and justices serve for a lifetime, affecting millions of people far into the future.

Can individuals do anything to influence the judicial nominations process?

Yes! Because our elected senators must vote to confirm judicial nominees, constituents play a key role in the judicial nominations process. Once a vacancy is announced, individuals may get involved through their state's screening committee (if the state has one) or by identifying and encouraging qualified candidates to apply. After a nominee is announced by the President, individuals can let their senators know their position on the nominee just as they can about legislation. There are many ways to express support or opposition for a nominee, including communicating with senators in person or by phone, mail, and email; organizing coalitions with like-minded groups; writing op-eds and letters to the editor; placing ads in local papers; and holding press conferences and rallies. The public has been influential in the past in defeating extreme nominees for lifetime judicial seats and in winning confirmation of highly qualified nominees.

Through BenchMark: NCJW's Judicial Nominations Campaign, the National Council of Jewish Women has been a leading voice in the progressive community's fight to ensure a fair and independent judiciary that keeps faith with constitutional values.