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The History of the Federal Judicial Appointment Process

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Every so often, the federal judicial appointment process is brought to the forefront of public consciousness. These instances are almost always sparked by the nomination of a candidate to the U.S. Supreme Court. Whether the nomination is accompanied by significant controversy or not, the prominence of the position—one held by only 112 people in history—is sure to bring about intense media coverage and public discussion.

AP Photo/Kelley McCall

Missouri Supreme Court Judge Ronnie White administers the oath to Maida Coleman as 5th District Senator in 2002, in Jefferson City, Mo. In 1999, White's nomination by Bill Clinton to be a federal judge was voted down by the Senate. He was later successfully nominated by Barack Obama.

In contrast, when it comes to the appointment of judges to the U.S. district courts and U.S. courts of appeals—the courts in which nearly all federal cases are resolved—few outside the legal community pay close attention. The judiciary is quite possibly the least well-known of the three branches that make up the federal government, and many are unaware of how judges come to join its ranks. This piece gives a brief history of the appointment process, especially for federal courts below the U.S. Supreme Court.

"Advice and Consent": How Would Federal Judges be Appointed?

The delegates to the Constitutional Convention in Philadelphia did not reach immediate agreement on a method of appointment for federal judges. Some wished the power to reside with the executive alone, believing that appointment by the legislature would invite bartering and compromise rather than a focus on the merits of a nominee. Others feared that granting the president exclusive power to select judges was a step toward monarchy. It was not until the last two weeks of the convention that the delegates agreed on a proposal by Nathaniel Gorham that mirrored the process in his home state of Massachusetts: appointment by the executive with the advice and consent of the smaller branch of the legislature.

The appointments clause that emerged from the convention was placed in Article II of the U.S. Constitution alongside other presidential powers and provided that the president, "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for." When Congress enacted the Judiciary Act of 1789, creating the U.S. district and circuit courts, there seems to have been no serious debate that the judges of the lower courts qualified as "other Officers of the United States" and would therefore be appointed in the same manner as the justices of the Supreme Court.

While the Constitution clearly delegated the nomination power to the presi-

dent and the confirmation power to the Senate, it provided no road map for how these functions were to be carried out and did not specify the parameters of the phrase "the Advice and Consent of the Senate." Thus, the question of precisely what the Constitution requires of the president and the Senate has been answered throughout the nation's history by differing practices regarding the selection of judicial nominees and Senate procedure upon receipt of a nomination.

Choosing a Nominee

The process of nominating and confirming a federal judge has always begun with the existence of a current or upcoming judicial vacancy. Congressional legislation determines the number of authorized judgeships on every federal court, so the president may not appoint a new judge unless one of the authorized seats on the court in question is vacant. Vacancies come about when judges retire, resign, or die; when they assume senior status, a state of semi-retirement; when they are appointed to a new judicial position (most commonly when a U.S. district court judge is appointed to a U.S. court of appeals); or, in very rare cases, when a judge is removed from the bench through impeachment and conviction. Also, Congress has from time to time authorized additional judgeships for the federal courts, thereby creating vacant seats for the president to fill.

Although the existence of a judicial vacancy may appear to be a simple matter, such has not always been the case. Shortly before leaving office in 1801, John Adams nominated several district court judges to fill the circuit court judgeships the Federalist majority in Congress had just created. However, Thomas Bee of South Carolina, Joseph Clay of Georgia, and John Sitgreaves of North Carolina declined the new circuit court appointments after they had been confirmed by the Senate, electing to remain on their respective district courts. The Senate had at the same time confirmed nominees to all three district court judgeships, but because Bee, Clay, and Sitgreaves did not vacate those seats as Adams had expected, the appointments were invalid.

The method of selecting judicial nominees has varied over the years, gradually becoming more formal and institutionalized. One constant has been that political and ideological concerns have always played a significant role in candidate selection. In the early period, when there was no formal institutional apparatus for evaluating potential judges, personal ties between nominees and the president, cabinet members, or senators were also crucial. For example, one of Andrew Jackson's first judicial appointments was John W. Campbell, who was among congressmen to vote for Jackson when the House of Representatives decided the 1824 presidential election. Jackson lost that election before winning in 1828.

The development of stronger parties in the antebellum era helped gradually to create more modern political conditions, characterized in Hall's words by a system "more formally structured by the impersonal bonds of party affiliation and the imposed discipline of party organization." Personal ties remained important, but picking federal judges became more explicitly party-directed, which led to greater involvement on the part of senators of the president's party. During the Franklin Pierce administration, senators began to initiate the selection process by putting forth their own candidates for the president's consideration. When Pierce had to fill a district judgeship in California in 1854, he chose Isaac Ogier, a pro-slavery candidate who had been recommended by the state's two Democratic senators. As Hall pointed out, Ogier had, as a member of the state assembly, helped to elect one of those senators. While senators choosing nominees did not then become a permanent feature of the judicial appointment system, it was a harbinger of future developments. After the Civil War, the process became ever more formal and institutionalized, gradually strengthening the role of home state senators.

In the twentieth century, while senatorial influence continued, an extensive bureaucratic apparatus evolved to advise the president on potential nominees. One outcome is that now potential nominees have been "vetted"—that is, subjected to a thorough investigation to make sure there is nothing in their background that would pose an obstacle to confirmation or embarrass the White House—prior to having their names submitted to the Senate. Participants in this investigation include White House staff, Department of Justice officials, the Federal Bureau of Investigation, and the Senate Judiciary Committee. Actively since 1953, the American Bar Association, through its Standing Committee on the Federal Judiciary, has advised the White House on the qualifications of potential nominees and published ratings of candidates after their nominations have been submitted. After having been formally nominated, candidates must complete a Judiciary Committee questionnaire that addresses matters including educational and professional background, any prior judicial service or public offices held, financial information, and potential conflicts of interest.

The Senate's Role

The Senate has always considered judicial nominations in executive session (as opposed to legislative session), during which it also considers treaties and other business received from the president. While the Senate opened its legislative sessions to the public in 1795, it kept its deliberations in executive session secret until 1929. Although the Senate Committee on the Judiciary was established in 1816, judicial nominations were referred to the committee only sporadically until 1868, when the Senate passed a rule mandating that all nominations be referred to the appropriate committee. After deliberating on a judicial nomination, the committee may report the nomination to the full Senate with a recommendation that it be confirmed; report it with a recommendation that it be rejected; report it with no recommendation at all; or decline to report the

nomination, meaning that it will "die in committee."

A major determinant of how the Judiciary Committee has handled nominations for the federal bench has been the concept of "senatorial courtesy." The term originally meant that the Senate would reject a nominee for a state-specific position (such as a U.S. district court judgeship) if a senator from the state in question declared the nominee to be "personally obnoxious" to them. By the post-Civil War period, however, senatorial courtesy had taken on a much more significant meaning, as home state senators from the president's party frequently had the ability to initiate the selection process by proposing one or more potential nominees from which the president could choose. Home state senators not of the president's party would not typically be given the opportunity to influence the selection process to the same extent, but senatorial courtesy often dictated that the president consult them prior to announcing a nominee.

Senatorial courtesy was strengthened by the advent of the "blue slip"—a form printed on blue paper and given to the home state senators by the chair of the Judiciary Committee. The chair requests that senators return the slip to the committee with an indication of approval or disapproval of the nominee. The blue slip is not provided for in the Senate's official rules, but is an informal device employed at the discretion of the committee chair, and is believed to have first been used in 1917 by Senator Charles Culberson, a Democrat from Texas.

Over the last century, Judiciary Committee chairs have followed differing policies regarding the use of blue slips. Until the mid-1950s, a negative or non-returned blue slip was taken into account in the committee's assessment of a nominee, but did not act as an automatic veto and therefore did not necessarily halt committee proceedings on a nomination. In more recent times, some committee chairs have not proceeded with a nomination unless and until both home state senators have returned positive blue slips, thereby giving individual senators a great deal of influence over the selection process.

For the U.S. courts of appeals, which encompass multiple states, the concept of senatorial courtesy has not applied with the same force. Each seat on an appellate court is customarily associated with a certain state, and since 1997, a federal law has required that each court of appeals have at least one judge residing in each state making up the circuit. As a result, home state senators have played a role in advising the president on nominees, but the president typically has much more discretion in selecting candidates.

If a nomination is not blocked, the committee chair will schedule a hearing on the nomination at which the candidate will be introduced by one or both home state senators and answer questions from the members of the committee. The practice of judicial nominees appearing before the committee to testify is a relatively recent one: only since 1955 have Supreme Court nominees routinely done so, and lower-court judges more recently than that. The Judiciary Committee did not begin to publish transcripts of confirmation hearings until after Senator

Discussion Questions

What does the U.S. Constitution, in Article III, say about the federal judiciary? Why was the Judiciary Act of 1789 needed? What did it accomplish?

How has the development of political parties affected the federal judicial appointment process? Have they "politicized" the process? What has that meant?

What does the U.S. Constitution, in Article II, Section 2, say about the president's power to appoint judges and the Senate's to confirm? Does the Constitution specify how, including how long, this process should take? Should it have done so?

What is a "recess" appointment? When and how have presidents used it to appoint federal judges to vacant positions? What actions have the Senate and the federal courts taken to either facilitate or restrict recess appointments? Why?

What is "senatorial courtesy"? How has it changed historically? To whom does it apply? Do you think it is a good practice?

Suggestions for Further Reading

Goldman, Sheldon. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, Conn., and London: Yale University Press, 1997.

Hall, Kermit L. *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–1861*. Lincoln, Neb., and London: University of Nebraska Press, 1979.

Palmer, Betsy. "Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History." Congressional Research Service, Report RL31948, May 13, 2009.

Rutkus, Denis Steven. "Role of Home State Senators in the Selection of Lower Federal Court Judges." Congressional Research Service, Report RL34405, February 11, 2013.

Sollenberger, Mitchel A. "The History of the Blue Slip in the Senate Committee on the Judiciary, 1917–Present." Congressional Research Service, Report RL32013, October 22, 2003.

Edward Kennedy became chair in 1979. Since 1981, however, confirmation hearings for Supreme Court nominees have been televised, and today hearings on all judicial nominees can be viewed on C-SPAN or the Judiciary Committee's website.

After having held a hearing on a judicial nominee, the committee will conduct a business meeting to deliberate on the nomination and vote on whether and how to report the nomination to the full Senate. Infrequently, the committee will vote not to report a nomination or to report a nomination unfavorably or without a recommendation. In the vast majority of cases in which the committee votes, however, it reports the nomination favorably. Once the committee has reported the nomination, it will appear on the Senate Executive Calendar, but will not be considered on the Senate floor until the majority leader schedules a vote. In order to vote, the Senate will move into executive session, and if a quorum (consisting of a majority of the senators) is present, the question will be posed: "Will the Senate advise and consent to this nomination?" Historically, most judges have been confirmed by a voice vote, rather than a roll-call vote, and many have been confirmed *en bloc*, or as a group. Only since the late 1990s have roll-call votes on judicial nominations other than to the Supreme Court become routine.

Failed Nominations

There are several paths by which judicial nominations have failed to result in judicial appointments. In the late eighteenth and early nineteenth century, when communication was difficult and slow, some candidates for the bench did not learn until after Senate confirmation that they had been nominated. It was not at all uncommon for such candidates to decline the appointment. Among George Washington's first batch of judicial nominees, put forth in September 1789, four candidates declined after confirmation, including Robert Harrison, one of the initial nominees to the Supreme Court. In the twentieth century, only three nominees have declined after confirmation, the last in 1945.

Some judicial nominations have been withdrawn by the president prior to a Senate vote. This has typically occurred at the request of the nominee or because the president came to believe that the nomination would not be confirmed. On a few occasions, presidents have, upon taking office, withdrawn nominations made by their predecessor and still pending.

The Senate has voted to reject some nominations, but this has occurred very rarely in recent times. In 1999, Bill Clinton nominated Ronnie White, a judge on the Supreme Court of Missouri, to be a federal district judge. The Judiciary Committee reported the nomination favorably, but some senators changed their minds in response to criticism from those opposing White. The nomination, defeated by a 54 to 45 vote, was the first to be voted down since 1987, and the first lower-court nomination to be voted down since 1951. White eventually became a federal judge after Barack Obama nominated him in 2014.

In the modern era, most nominations that encounter substantial Senate opposition are not subjected to a confirmation vote. If the nomination does not die in committee, the Senate majority leader may decline to schedule a vote on the nomination, or if enough senators oppose the nomination, they may block it by a filibuster (although a Senate rule change in 2013 made this more difficult). Nominations not receiving a vote are, by Senate rules, returned to the president if the Senate takes a recess of 30 days or at the termination of the Senate session during which the nomination was made. Since the middle of the twentieth century, the Senate has returned an increasing number of judicial nominations to the president, although many such nominations have been resubmitted during the next Senate session and confirmed.

On rare occasions, judicial appointments have failed because of errors or other procedural quirks. In 1939, Franklin D. Roosevelt was forced to withdraw the nomination of Gaston Porterie, whom he had mistakenly nominated to the Northern District of Louisiana, a judicial district that did not exist. In 1841, John Tyler canceled Bennet Crawford's recess appointment to the Eastern and Western Districts of Louisiana, having made the appointment in the erroneous belief that the recently appointed Theodore McCaleb had died. In perhaps the strangest case, Ulysses Grant attempted in 1873 to swap Richard Busteed, a Northerner serving as a district judge in Alabama who had become increasingly unpopular there, with David Humphreys, an Alabama native serving in the District of Columbia. Grant made each nomination contingent on the other's resignation, but the Senate returned the nominations to Grant on the basis that the swap was impermissible.

Recess Appointments

In addition to the regular appointment power, Article II of the Constitution grants the president the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Presidents have made over 300 recess appointments of federal judges—including justices of the Supreme Court—but have done so only three times since 1964. The great majority of judges receiving recess appointments later went through the standard confirmation process and received tenure "during good behavior" pursuant to Article III; only 24 had their service terminated after being nominated but failing to obtain Senate confirmation. Some have argued that recess appointments to the federal judiciary are unconstitutional because judges appointed in this manner lack the tenure and salary protections of Article III that serve to protect judicial independence. Although legal challenges to this effect have failed, judicial recess appointments have become controversial, and in recent years the Senate has conducted *pro forma* sessions that preclude a recess of sufficient duration for the president to make a recess appointment.

Political Circumstances Play a Role

The Constitution does not spell out how the president and Senate are to carry out their delegated responsibilities with regard to judicial appointments. One result has been that presidents have approached nominee selection in different ways, depending on their own preferences but also on political circumstances. At times, presidents have had more flexibility in deciding to whom to turn for candidate recommendations, but at other times, home state senators have asserted a great deal of influence over this aspect of the process. Moreover, as candidate selection became more bureaucratic and institutionalized, an extensive governmental apparatus evolved to guide the choosing of federal judges. Likewise, the Senate has varied its procedures for handling judicial nominations depending on political circumstances, but also on its own internal rules, customs, and practices, particularly in the Judiciary Committee. Amid such variation, at least one thing has remained constant. Although the nation has been more polarized at certain moments in its history than at others, politics has always played a significant role in shaping the contours of the judicial appointment process.

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