A Practical Look at Federal Judicial Selection

BY RACHEL BRAND

SOME COMMENTATORS HAVE RECENTLY SUGGESTED abolishing Texas's judicial elections and granting the Governor the authority to appoint judges after confirmation by the legislature. Although certain states already use an appointment and confirmation system of judicial appointments, the best-known such system is the federal judicial appointment process. It may be useful to understand how that process works in order to assess the wisdom of adopting a similar system in Texas.[1]

The constitutional mechanics of the federal process are well-known – the President nominates a judge, and the U.S. Senate confirms her to a lifetime appointment. But the details of that process, especially how one comes to be the nominee in the first place, are less known, even though they are of great interest to many lawyers.[2] When a federal judge retires or Congress creates a new judgeship, there will be at least dozens and perhaps thousands of lawyers qualified to fill the vacancy. Which of them gets the job will depend on a case-specific combination of political, personal, and substantive factors. Although it is difficult to generalize about such an idiosyncratic process, this piece is intended to provide a brief and practical insight into how it works, based on the author's experience assisting President George W. Bush in selecting judicial nominees.[3]

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Practically speaking, the President relies on a team of aides to help him select judicial nominees. Which individual officials are responsible for judicial selection varies from Administration to Administration, but they usually work in the White House Counsel's Office and the Justice Department. In George W. Bush's Administration, for example, the key players were the White House Counsel's Office, the Attorney General, and the Justice Department's Office of Legal Policy. White House and Justice Department lawyers vet candidates for judicial appointments, but they do not write on a clean slate – rather, the Senate's views influence the judicial appointment process even before the President makes a nomination.

The Senate has two distinct ways of participating in judicial selection. It participates as a body by considering the President's judicial nominees after nomination. But individual Senators also play a role in determining whom the President nominates in the first place. This is because, by tradition, selection of federal judges is a very local exercise. Senate procedure gives the "home-state senators" for each judgeship (the Senators representing the state in which the judgeship is located) the power to block the confirmation of a nominee to whom they object, even if that nominee could be overwhelmingly confirmed if given a vote in the full Senate. This power is exercised through the "blue slip" process, by which a home-state Senator informs the Senate Judiciary Committee whether or not he will allow a nomination to a judgeship in his state to move forward. At least in recent years, Senate Judiciary Committee Chairman have required both home-state Senators to return positive blue slips for a nominee before scheduling a confirmation hearing.

In light of the home-state Senators' power to block objectionable nominations, Presidents tend to consult extensively with them before making nominations. In fact, with respect to District Court nominations (and, in some cases, Court of Appeals nominations), Senators often expect the President to nominate the person the Senator has recommended, or at least to choose from a short list of options provided by the Senator.

Partisan politics plays a role in all of this. Where one home-state Senator is from the President's party and the other is not, the Senator from the President's party is generally understood to have the prerogative to provide candidates to the President. However, that Senator likely will consult with his colleague from the other party before submitting names,

and whether or not he does so, the President will seek the views of the opposite-party Senator or risk a negative blue slip after nomination. When both of a state's Senators are from the opposite party, Presidents sometimes designate an official in that State from the President's party – such as a senior member of the state's U.S. House delegation – to provide recommendations. Nevertheless, the Senators' views cannot be ignored, as they – not the Congressman – will exercise the blue-slip power.

In most Administrations, the President gives less deference to the home-state Senators with respect to U.S. Court of Appeals appointments.[4] In the Bush Administration, the lawyers assisting the President with judicial selection supplemented the Senators' lists of Court of Appeals candidates by finding and interviewing additional qualified individuals. Nevertheless, the home-state Senators' views remain critically important because they possess the blue-slip power for both District Court and Court of Appeals nominations.

In light of the Senators' influence over the President's nominations, the likeliest way to become a judicial nominee is to be recommended to the President by a Senator. Unfortunately, there is no formula for becoming a Senator's recommended candidate – every state, every Senator, and every case is different. Some Senators conduct their own exhaustive searches of the state bar for the most qualified candidates. Other Senators rely on ad-hoc commissions to vet candidates and provide a slate of recommendations to the Senators, who choose from that slate which names to suggest to the President. In other cases, an individual candidate might be recommended to the President because he is the state bar chairman, because of her political influence in the state, or even because he was the Senator's law-school roommate.

Eventually, the President will narrow the field to one prospective nominee. Even then, that person must clear several additional hurdles before the President will nominate her. Nominees are required to complete a stack of forms asking for extensive information about personal history, professional qualifications, and financial assets.

Perhaps the most time-consuming of these is the Senate Judiciary Committee Questionnaire, which asks detailed questions about employment history, requests lists of cases litigated (or of opinions decided in the event that a current judge is being elevated), and requires specifics of the nominee's financial holdings and liabilities, among other things. Although this form is written by the Senate, not the President, the White House normally requires prospective nominees to complete it before nomination. Most of the information provided on this form will be made public by the Judiciary Committee after nomination.

Other forms are required for the Federal Bureau of Investigation's thorough background check, which inquires into everything from criminal history to tax compliance to mental stability. Simultaneously, Justice Department lawyers will undertake a searching "vet" of the nominee's legal qualifications, legal employment history, written record, and reputation in the legal community. Both the FBI and the Justice Department vetters conduct interviews of the prospective nominee's colleagues and acquaintances and members of the local legal community, including sitting judges, to discuss the candidate's background and qualifications.

Because federal judicial appointments are so-called "lifetime appointments," prospective nominees are asked to provide the results of a comprehensive medical examination.[5]

Finally, in the Obama Administration and in many past Administrations, the White House has asked the American Bar Association to review and rate the qualifications of each of the President's prospective nominees.[6]

If all of these tests are passed, the President will formally nominate the individual. At that point, the Senate gains control of the process, though White House and Justice Department officials work closely with the Senate in an attempt to move confirmations forward as quickly and smoothly as possible.

The first stop for a judicial nomination is the Senate Judiciary Committee. As mentioned above, the Committee usually will not take action on a nomination until both home-state Senators have returned positive blue slips to the Committee. Once that has happened, it is up to the Committee Chairman to schedule a confirmation hearing. There is no requirement that the Chairman sequence confirmation hearings in the order the nominations were received, and some nominees never receive confirmation hearings because of Senate opposition to their nominations.[7]

When they are scheduled, confirmation hearings often combine multiple judicial nominees; a common scenario would be a joint hearing for one Court of Appeals nominee and two or three District Court nominees. If the nominations at issue are contentious, all or most of the Committee's 19 members might attend the hearing, and the hearing might last more than a day. In the case of uncontroversial nominees, as few as one Senator

might attend, and each nominee might be asked only one or two questions. Typically, one or both home-state Senators (or occasionally a home-state Congressman) will appear before the Committee to introduce the nominee, after which the nominees will be sworn in to answer Senators' questions. After the hearing, Senators may submit written "Questions for the Record" (QFRs) to the nominees. Uncontroversial nominees may receive no questions, while controversial nominees may receive pages of questions, all of which must be answered in writing, under penalty of perjury, within a week.

The next necessary step toward confirmation is a vote by the Judiciary Committee. The first potential opportunity for a vote is normally a week after the hearing takes place, but these votes are routinely delayed for weeks or months and could be delayed indefinitely for political reasons. When a vote is held, a majority "aye" vote results in the nomination being forwarded to the Senate "floor" for consideration by the full Senate. A majority "nay" vote usually means the nomination is dead, although on rare occasions, the Judiciary Committee has forwarded a nomination to the full Senate with a negative recommendation.

At this point, the fate of the nominee is in the hands of the Senate Majority Leader, who controls the full Senate's schedule. As in the Judiciary Committee, the power to schedule is significant – nominations can be defeated by allowing them to languish indefinitely. When a floor vote on a nomination is scheduled, the procedure may be as simple as seeking "unanimous consent"[8] for confirmation of an uncontroversial nominee or as complicated as scheduling hours of floor debate on a high-profile nominee, and may even involve threats of filibuster for particularly contentious nominees. Regardless of which of these scenarios unfolds, the last necessary step to confirmation is an affirmative vote by a majority of the full Senate.

Confirmation, however, is not yet the end of the process. The final stage is appointment, which the President accomplishes by signing the judge's commission.

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1 This article takes no position on the relative merits of judicial elections versus judicial appointments.

2 This piece discusses the selection and confirmation process for U.S. District Court and U.S. Court of Appeals judges. The process for U.S. Supreme Court nominees is quite different and is beyond the scope of this article.

3 The author served as Associate Counsel to the President at the White House and later as Assistant Attorney General for Legal Policy at the U.S. Department of Justice. She handled judicial selection and confirmation issues in both capacities. She currently practices law with WilmerHale in Washington, D.C. The views expressed in this article are her own and do not reflect the views of the firm or any of its clients. The author has addressed some of these issues in more detail in Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL'Y 47 (2010).

4 Although most U.S. Courts of Appeals encompass multiple States, each judgeship in a circuit is understood to belong to a particular state.

5 The U. S. Constitution provides that judges "shall hold their Offices during good Behavior," which in practice means the judge holds her office as long as she wants to. The only way to remove a federal judge from office against her will is by impeachment. Judicial impeachments have happened only rarely in American history, though the U.S. House of Representatives impeached Judge G. Thomas Porteous Jr.of the Eastern District of Louisiana earlier this year, and as of this writing, the Senate is conducting the trial that will determine whether he is convicted and removed from office.

6 During the George W. Bush Administration, the White House did not make the ABA privy to the identity of the President's nominees before nomination. Instead, the ABA conducted its review and published its rating of each nominee after nomination. In most cases, the Senate Judiciary Committee waited to receive the ABA's rating before holding a confirmation hearing.

7 The political dynamics that have delayed judicial confirmation hearings and votes during the last few Presidents' Administrations are the subject of extensive news reporting and commentary but are beyond the scope of this article.

8 Under this procedure, Senate leadership seeks the consent of every Senator before the vote occurs, so that no roll-call vote is needed.