

# Federal Judicial Nominations: 9 Steps from Vacancy to Confirmation

Most Americans don't know how or why a federal judge is chosen but they should. Federal judges make decisions that affect our lives – from hearing cases impacting the environment, health care, Social Security benefits and immigration – to having the final say in determining who we can marry, whether our speech is protected, or how we can vote. Federal judges are appointed for life and their decisions can have a much more lasting impact than any one election. There are 874 federal judgeships and right now, a significant percentage of those seats are vacant.

Under the U.S. Constitution, the president appoints federal judges by and with the advice and consent of the Senate. When a vacancy occurs, the White House consults with the U.S. senators who represent the state in which the judge would be located, often soliciting their recommendations before identifying candidates to fill the vacancy. After a candidate is officially nominated, the Senate determines how quickly, if at all, the president's nominee moves through the confirmation process.

The entire process – from vacancy to confirmation – can take years or months depending on the Senate process, which is fraught with roadblocks. Throughout the process, senators can slow or block progress by: failing to initiate or participate in a candidate recommendation process, refusing to return blue slips, delaying the Senate Judiciary Committee vote, postponing or obstructing a full vote in the Senate, or filibustering a nominee and requiring a supermajority of 60 votes to proceed.

Despite these roadblocks, the good news is that advocates (especially as constituents) have several places in the process to be involved in significant ways. What follows is a description of each step in the process, highlighting when advocates can engage.

**1. A vacancy occurs:** Federal court appointments are for life, so it is up to each judge to decide when to step down. Judges often give advance notice of up to one year before they plan to leave a federal district court or circuit court of appeals. When a seat on a federal court remains empty, Americans who rely on that court to resolve business disputes, Social Security claims and constitutional challenges are denied timely access to justice.

**2. The White House consults home state senators:** If there is a vacancy on a federal court, the White House consults with the senators who represent the state in which the vacancy will occur, often referred to as the “home state senators.” Home state senators may recommend candidates to the White House by:

- Conducting exhaustive searches through the state bar for candidates;
- Creating selection committees, often made up of leading attorneys in the state;
- Selecting candidates based on the recommendations of these commissions or other considerations

The selection process can be slowed if home state senators fail to timely recommend a candidate to the president or delay in engaging with the White House in its consultation.

**3. The White House conducts a thorough vetting:** Thorough vetting of a candidate's background includes the following:

- Completion of the Senate Judiciary Committee Questionnaire, which asks detailed questions about employment history, requests lists of cases litigated or opinions drafted, and requires specifics of the nominee's financial holdings and liabilities, among other things (Most of the

information on this form will be made public by the Senate Judiciary Committee after the nomination.);

- An investigation by Department of Justice lawyers of the candidate's legal qualifications, employment history, reputation, written record, etc.;
- Interviews of the candidate's colleagues, opposing counsel, supervisors, acquaintances and members of the local legal community, including sitting judges, to discuss the candidate's background and qualifications;
- Multiple interviews with the candidate;
- A background investigation by the FBI called a "BI," which includes information such as the candidate's criminal history, employment verification, and tax compliance, but also professional reputation interviews;
- Results of a medical examination;
- and
- An independent, nonpartisan peer review by the American Bar Association's Standing Committee on the Federal Judiciary, which rates the candidate as:
  - Well Qualified: the prospective nominee is at the top of the legal profession in his or her legal community; has outstanding legal ability, breadth of experience, and the highest reputation for integrity; and demonstrates the capacity for sound judicial temperament.
  - Qualified: the prospective nominee satisfies the committee's very high standards with respect to integrity, professional competence and judicial temperament, and that the committee believes that the prospective nominee is qualified to perform satisfactorily all of the duties and responsibilities required of a federal judge.
  - Not Qualified: prospective nominee does not meet the committee's prospective nominee's professional qualifications.

Once a candidate successfully completes the White House vetting, the president formally nominates the candidate.

**4. The Senate Judiciary Committee sends "blue slips" to home state senators:** Once a nomination is made, the process moves to the Senate Judiciary Committee, which is made up of 18 senators. The committee sends a "blue slip" to each home state Senator. Blue slips, letters printed on light blue paper, are used by the Committee to ask home state senators to approve Committee consideration of a nominee who would serve in their state. In recent years, blue slip approval from a home state senator has been a de facto requirement to move forward with a candidate. Because of this, home state senators have the power, once again, to hold up the process by failing to return the blue slip or failing to do so in a timely manner – often without explanation.

**5. The Senate Judiciary Committee conducts a hearing:** The chair of the Senate Judiciary Committee, in consultation with the ranking member, will schedule a committee hearing. At the hearing, committee members have an opportunity to question a nominee. They also have an opportunity following a hearing to submit written questions to the nominee.

**6. The Senate Judiciary Committee votes:** Following the hearing and answers to any written questions that have been submitted, a committee vote is scheduled. The first time a vote is scheduled, any member of the Senate Judiciary Committee can delay the vote until the committee's next executive business meeting (usually one week, but sometimes much longer), without reason. This is a now-routine, but unnecessary, slow down in the process. Once a nominee is voted favorably out of committee, with a majority vote, the nomination can be forwarded to the Senate floor for consideration by the entire Senate.

**7. Senate majority leader schedules a full vote in the U.S. Senate:** The Senate majority leader must schedule the floor vote on a nominee. While the Majority Leader prioritizes the Senate's agenda, most votes on nominations are scheduled by unanimous consent – meaning that all 100 senators agree to limit debate and allow for a vote. As a result, senators in the minority can block the prompt scheduling of a full Senate vote, which can postpone the nomination almost indefinitely. Without unanimous consent, there is an effective filibuster of a nominee, and the majority leader can only force a confirmation vote by filing cloture. Cloture is a time-consuming process that could consume days for each nomination. It also requires a supermajority of 60 votes to end debate and proceed to a confirmation vote.

**8. The Senate votes to confirm a nominee:** When the Senate votes on confirmation – scheduled either by unanimous consent or through successfully invoking cloture – nominees are confirmed by a simple majority of senators. However, as noted above, cloture is only successful with a supermajority of 60 votes, and therefore there may be an effectively higher threshold than the simple majority on final confirmation.

**9. Lifetime Appointment Begins:** The president signs the nominee's commission, a large, engraved document to conclude the process.