Congressional Research Service

Report RL34405

Role of Home State Senators in the Selection of Lower Federal Court Judges

Denis Steven Rutkus, Government and Finance Division

March 6, 2008

Abstract. This report examines the role played by Senators in the selection of nominees to two kinds of lower court judgeships - to U.S. district court judgeships in the federal judicial districts lying geographically within the Senators' states and to U.S. court of appeals judgeships in the judicial circuits of which the Senators' states are a geographic part.

Role of Home State Senators in the Selection of Lower Federal Court Judges

Denis Steven Rutkus
Specialist on the Federal Judiciary

March 6, 2008

Congressional Research Service
7-5700
www.crs.gov
RL34405

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Supported by the custom of "senatorial courtesy," Senators of the President's party have long played, as a general rule, the primary role in selecting candidates for the President to nominate to federal district court judgeships in their states. They also have played an influential, if not primary, role in recommending candidates for federal circuit court judgeships associated with their states. For Senators who are not of the President's party, a consultative role, with the opportunity to convey to the President their views about candidates under consideration for judgeships in their states, also has been a long-standing practice—and one supported by the "blue slip" procedure of the Senate Judiciary Committee.

Senators, in general, exert less influence over the selection of circuit court nominees. Whereas home state Senators of the President's party often dictate whom the President nominates to district judgeships, their recommendations for circuit nominees, by contrast, typically compete with names suggested to the Administration by other sources or generated by the Administration on its own.

Whether and how a state's two Senators share in the judicial selection role will depend, to a great extent, on their respective prerogatives and interests. Senators have great discretion as to the procedures they will use to identify and evaluate judicial candidates, ranging from informally conducting candidate searches on their own to relying on nominating commissions to evaluate candidates. Contact between a Senator's office and the Administration can be expected to clarify the nature of the Senator's recommending role, including the degree to which the Administration, in its judicial candidate search, will rely on the Senator's recommendations.

If a President selects a district or circuit court nominee against the advice of, or without consulting, a home state Senator, the latter must decide whether to oppose the nomination (either first in the Senate Judiciary Committee or later on the Senate floor). From the Senator's standpoint, opposition to the nomination might serve a number of purposes, including helping to prevent confirmation or influencing the Administration to take consultation more seriously in the future. On the other hand, various considerations might influence the Senator not to oppose the nomination, including the desirability of filling the vacant judgeship as promptly as possible and, if more home state vacancies are possible in the future, whether these might provide the Senator a better opportunity for exerting influence over judicial appointments.

In recent years, the role of home state Senators in recommending judicial candidates has given rise to various issues, including the following: What constitutes "good faith" or "serious" consultation by the Administration? Should home state Senators always have the opportunity to provide their opinion of a judicial candidate before he or she is nominated? How differently should the Administration treat the input of Senators, depending on their party affiliation? What prerogatives should home state Senators have in the selection of circuit court nominees? Should the policy of the Judiciary Committee allow a home state Senator to block committee consideration of a judicial nominee?

Contents

Contacts

Introduction

By long-standing custom, Senators of the President's party, as a general rule, have played the primary role in selecting candidates for the President to nominate to federal district court judgeships in their states. They also generally have played an influential, if not primary, role in recommending candidates for federal circuit court judgeships associated with their states. For Senators who are not of the President's party, a consultative role, with the opportunity to convey to the President their views about candidates under consideration for judgeships in their states, has been a long-standing practice as well.

In recent years, however, the role to be played by "home state Senators" in the selection process for lower court judges has periodically been the subject of debate. With controversy frequently arising in the Senate over whether that body should confirm various of the President's judicial nominees,[1] part of the contention sometimes has involved the question of whether, or to what degree, Senators should play a role in advising the President on whom to select as judicial nominees from their states.[2] To assist in examining that question, this report provides an analysis of the role that home state Senators, historically and in the contemporary era, have played in the lower court selection process.

Specifically, this report examines the role played by Senators in the selection of nominees to two kinds of lower court judgeships—to U.S. district court judgeships in the federal judicial districts lying geographically within the Senators' states and to U.S. court of appeals judgeships in the judicial circuits of which the Senators' states are a geographic part.[3] In separate sections the report discusses:

- the historical origins of the role of Senators recommending persons for nomination to lower court judgeships—particularly, the custom of "senatorial courtesy" and the Senate Judiciary Committee's long-standing "blue slip" procedure;
- the effect of Senators' political party affiliation on their role as recommenders of judicial candidates from their state;

[1] See, for example, "Acrimony Reigns over Judicial Picks," in *CQ Almanac Plus, 2002*, vol. 58 (Washington: Congressional Quarterly Inc., 2003), pp. 13.12-13.13; "Judicial Nominee Battles Intensify," in *CQ Almanac Plus, 2003*, vol. 59 (Washington: Congressional Quarterly Inc., 2004), p. 13.19; "Acrimony over Judges Continues," in *CQ Almanac Plus, 2004*, vol. 60 (Washington: Congressional Quarterly Inc., 2005), pp. 12.15-12.16; "'Gang of 14' Averts Judicial Showdown," in *CQ Almanac Plus, 2005*, vol. 61 (Washington: Congressional Quarterly Inc., 2006), pp. 14.8-14.9; and Sheldon Goldman et al., "Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress," *Judicature*, vol. 90, May-June 2007, pp. 252-283. (Hereafter cited as Goldman et al., "Picking Judges.")

[2] See, in this vein, a discussion by judicial appointments scholars in 2005 of "the debate over the scope of consultation that the [George W.]Bush White House has and should have with senators, presumably of any political stripe.... " Sheldon Goldman et al., "W. Bush's Judiciary: The First Term Record," *Judicature*, vol. 88, May-June 2005, p. 249. (Hereafter cited as Goldman et al., "W. Bush's Judiciary: The First Term Record.")

[3] This report, it should be noted, does not cover the role played by Senators in the selection of persons nominated by the President to be U.S. attorneys or U.S. marshals in the Senators' states. Also outside the scope of this report are the selection processes for nominees to district or circuit courts in jurisdictions not geographically connected to states (and thus not represented by Senators). Specifically, not examined herein are the selection processes for nominees to the U.S. District Court for the District of Columbia, the U.S. Court of Appeals for the District of Columbia Circuit, the U.S. District Court for the District of Puerto Rico, and the U.S. Court of Appeals for the Federal Circuit (a court which is headquartered in Washington, D.C., and has nationwide jurisdiction defined by subject matter).

- the lesser role that Senators generally play when recommending circuit court, as opposed to district court, candidates;
- the process by which Senators evaluate and select judicial candidates;
- Senators' contacts with a President's administration after they make their recommendations but before the President selects a nominee;
- the options available to home state Senators when the President selects a judicial nominee against their advice, or without consulting them; and
- issues that have arisen in recent years over the proper role, and degree of influence, for home state Senators in the selection of nominees for U.S. district and circuit court judgeships.

Background and Origins of Senators' Recommending Role

The Senate's Exercise of "Advice and Consent"

The President's appointments of judges in the federal court system are made subject to the approval of the Senate.[4] These appointments take place through a process, provided for in the Constitution, in which the President nominates and appoints persons to federal office "by and with the Advice and Consent of the Senate."[5] Exceptions to this rule are the relatively rare judicial appointments which the President alone makes, without the requirement of Senate approval, through his power, under the Constitution, to make temporary "recess appointments."[6]

[4] Subject to Senate confirmation, the President makes judicial appointments to the following federal courts—the Supreme Court of the United States, U.S. Circuit Courts of Appeals, U.S. District Courts (including the Territorial courts), U.S. Court of International Trade, U.S. Court of Federal Claims, U.S. Tax Court, U.S. Court of Appeals for Veterans Claims, and U.S. Court of Appeals for the Armed Forces. (Regarding the role played by Senators in the appointment of Supreme Court Justices, see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.) The President also appoints, subject to Senate confirmation, judges to two local courts—the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

Federal judges whom the President does not appoint include the following: bankruptcy judges (appointed by the U.S. Courts of Appeals); administrative law judges (appointed by federal executive agencies); magistrates (appointed by the U.S. District Courts); and trial and intermediate court judges in the Armed Forces (appointed by the Judge Advocate General in each military service).

[5] Article II, Section 2, Clause 2. In fuller part, Clause 2 provides that the President "shall nominate, and 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, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments."

[6] Specifically, Article II, Section 2, Clause 3 of the U.S. Constitution empowers the President "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." Since the first Administration of George Washington, Presidents have made more than 300 recess appointments to the federal judiciary, including 12 to the Supreme Court. See Henry B. Hogue, "The Law: Recess Appointments to Article III Courts," *Presidential Studies Quarterly*, vol. 32, Sept. 2004, pp. 656-673; and CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead.

The Senate most visibly exercises its "advice and consent" role with respect to judicial appointments when Senators vote on a nomination—either in committee (on whether to report the nomination to the Senate) or on the Senate floor (on whether to confirm).[7] Another significant, though less public, exercise of Senate "advice and consent" on judicial nominations, it can be argued, occurs when individual Senators provide actual advice to the President on whom to nominate to particular federal judgeships. By long-standing custom, dating back to the early 1800s, Senators of the President's party, in their capacity as home state Senators, have regularly provided Presidents such advice, recommending candidates for judgeships situated in their states or linked by tradition to their states. For Senators who are not of the President's party, a consultative role, with the opportunity to convey to the President their views about candidates under consideration for judgeships in their states, also has been a long-standing practice.

Role for Senators in Selecting Nominees Linked to Their States

Technically, each Senator is free to recommend candidates for any federal judgeship to be filled by presidential nomination. In reality, however, the ability of Senators to have their judicial recommendations heeded by a President will, in most cases, depend on the judgeship in question having a geographic link to the Senators' own state. A Senator, for instance, rarely will be able to exert influence on behalf of a judicial candidate for a geographically based court, such as a U.S. district court or a U.S. court of appeals, if the court is not geographically all or in part within the Senator's state. Similarly, most Senators, on any particular occasion, might have little basis on which to make judicial recommendations for a nationwide court of specialized subject matter jurisdiction (such as the Tax Court or the Court of Appeals for Veterans Claims), unless they are members of a Senate committee having jurisdiction over the court, have expertise in the court's subject matter, or have some other special interest in the court.[8]

By contrast, every U.S. Senator makes recommendations or in some way is consulted about potential candidates for judgeships in (1) the U.S. district court or courts which geographically fall within the Senator's state, and (2) the U.S. court of appeals "circuit" of which the Senator's state is a geographic part—provided the circuit judgeship historically has been filled by a resident of the Senator's state.[9] For these judgeships, long-standing Senate customs, as well as norms in

[7] A Senate vote to confirm requires a simple majority of Senators voting, a quorum being present. See CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (under heading "Consideration and Disposition"). This quorum requirement is derived from Article I, Section 5, Clause 1 of the U.S. Constitution, which states in part that "a Majority of each [House] shall constitute a Quorum to do Business.... " Hence, the quorum for conducting business in a Senate of 100 Members is 51 Senators.

[8] Writing in 1953, a scholar noted that the President had "wider discretion" in the selection of judges to such specialized courts as the Tax Court and the Customs Court [now the U.S. Court of International Trade], as well as to federal courts in the District of Columbia and the Territorial Courts, than he did in selecting U.S. district court nominees in each of the states, "for members of the Senate may not claim the right to dictate these appointments though they often press for the appointment of their candidates." Joseph P. Harris, *The Advice and Consent of the Senate* (Berkeley: University of California Press, 1953; reprint, New York: Greenwood Press, 1968), p. 314 (page citation here, and in subsequent footnotes, is to the reprint edition). (Hereafter cited as Harris, *Advice and Consent.*) Subsequently, in 1972, another scholar wrote: "In appointing judges to the District Court of the District of Columbia, the Court of Appeals for the District of Columbia, the United States Court of Customs and Patent Appeals, the United States Court of Claims, and the United States Customs Court, the power of the individual senator is further diminished in favor of the president's men. Since the selection for those posts can be made from any state in the union, any one senator's claim to an appointment cannot be very strong." Harold W. Chase, *Federal Judges; The Appointing Process* (Minneapolis: University of Minnesota Press, 1972), p. 45. (Hereafter cited as Chase, *Federal Judges.*)

[9] Courts within the U.S. courts of appeals system are divided geographically into 11 regional circuits, with each circuit (continued...)

Senate-presidential relations, govern, to a great extent, the role of individual Senators in the appointment process. The two most important of these customs arguably are "senatorial courtesy" and the "blue slip" practice of the Senate Judiciary Committee.

Senatorial Courtesy

Dating back to 1789, senatorial courtesy, as defined by one authority, is the "Senate's practice of declining to confirm a presidential nominee for an office in the state of a senator of the president's party unless that senator approves."[10] "In our day," another scholar has written, "senatorial courtesy has come to mean that senators will give serious consideration to and be favorably disposed to support an individual senator of the president's party who opposes a nominee to an office in his state." This scholar noted, however, that, as the practice of senatorial courtesy had evolved in the contemporary period, the Senate could not be expected to automatically support a Senator opposing a nomination if "his reasons are not persuasive to other senators or if he is not a respected member of the Senate.... "[11]

The custom of senatorial courtesy provides the foundation for a special role in the nomination and confirmation process for a Senator of the President's party, whenever a presidential nomination is for a federal office in the Senator's state. The Senator's role is essentially a negative one in those relatively rare instances when the Senator opposes, and thereby seeks to block, a nominee's confirmation. In these situations, the Senator, by invoking senatorial courtesy, ordinarily can look to the rest of the Senate's Members to join the Senator in opposing the nomination. Much more frequently, however, the Senator's role is positive in nature when, periodically, he or she engages in making recommendations to the President about whom to nominate to federal offices in the Senator's state. In these situations, the custom of senatorial courtesy, it can be argued, encourages the President to be receptive to the Senator's recommendations—rather than risk selecting nominees opposed not only by the Senator, but by the Senate as a whole, united in support of its colleague.

The precedent of senatorial courtesy, according to Joseph P. Harris, in his landmark study, *The Advice and Consent of the Senate*,[12] was set in 1789. Congress had been in session for only three months of its first term when the Senate rejected its first presidential nominee—one Benjamin Fishbourn, whom President George Washington had nominated to the post of naval officer of the Port of Savannah. Though Fishbourn apparently had excellent qualifications for the position, the Senate rejected the nomination as a courtesy to the two Senators from Georgia, who had a

(...continued)

court including at least three states. (There also is a twelfth, geographically based federal court of appeals, in the District of Columbia.) In the following pages, nominations to court of appeals judgeships are referred to as circuit court nominations, and the courts are referred to as circuit courts. A map showing the geographic boundaries of the 11 regional circuit courts, and all of the U.S. district courts, is available on the federal judiciary's website, at http://www.uscourts.gov/images/CircuitMap.pdf, accessed on Feb. 15, 2008.

[10] Walter Kravitz, *Congressional Quarterly's American Congressional Dictionary*, 3d ed. (Washington: Congressional Quarterly Inc., 2001), p. 231.

[11] Chase, *Federal Judges*, p. 7.

[12] Harris, *Advice and Consent*, pp. 40-41. For more on Senate precedents and senatorial courtesy, see also Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 951-952.

candidate of their own. The next day, Washington withdrew the Fishbourn nomination and nominated the candidate desired by the two Georgia Senators.

In the Fishbourn episode, the courtesy that the Senate's members as a whole extended to their two colleagues from Georgia—by rejecting the nomination that the two Senators opposed—was an important precedent. As Harris explained:

> The Fishbourn case initiated the custom which requires the President to consult with the senators from the state in which a vacancy occurs, and to nominate a person acceptable to them; if he fails to do so, the Senate as a courtesy to these senators will reject any other nominee regardless of his qualification. The custom is usually invoked, however, only by senators of the same party as the President. It did not become firmly established in Washington's administration, for he continued to hold to the doctrine that the power of nomination belonged exclusively to the President and continued to consult widely in making his selections. Under later Presidents with less prestige, less force of character and less determination, the rule became firmly established with respect to senators of the same political party as the President. [13]

Harris, writing in 1953, described what was then the "well-established custom, which has prevailed since about 1840," wherein U.S. district judges "are normally selected by senators from the state in which the district is situated, provided they belong to the same party as the President." (By contrast, the President was said to have "a much freer hand in the selection of judges to the circuit courts of appeal, whose districts cover several states.... "[14]) Another scholar, less than a decade earlier, in 1944, had described as near-absolute the power of home state Senators of the President's party to select district court nominees. The Senate, he maintained, had "expropriated the President's power of nomination so far as concerns appointments of interest to senators of the party in power; and the President has virtually surrendered his power directly to local party politics as to appointments in states where the senators are of the opposition."[15]

According to two other scholars, Senators, from the very beginning, "recognized that judgeships could be used effectively to reward loyal supporters back home." Senators also realized:

that it would be damaging to their prestige if the President appointed to a judgeship within their own state someone of whom they disapproved. As a result, senators joined together to protect their individual interests in judicial appointments. The custom of "senatorial courtesy" grew out of these considerations.[16]

In the latter half of the 20th century, it continued to be common for Senators to regard their role in the appointment of U.S. district judges as more in the nature of selection than of recommendation. In 1977, former Senator Joseph W. Tydings (D-MD) wrote that selection of a U.S. district judge "is a power jealously guarded by many senators. It is an extremely important source of political patronage, and many senators consider judicial selection to be one of the duties they were elected

[13] Ibid., p. 41

[14] Ibid, p. 314.

[15] Evan Haynes, *The Selection and Tenure of Judges* (Newark, NJ: National Conference of Judicial Councils, 1944), p. 23.

[16] Larry C. Berkson and Susan B. Carbon, *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates* (Chicago: American Judicature Society, 1980), p.12.

to perform."[17] In 1989, similar sentiments were expressed by Senator Thad Cochran (R-MS) amid a controversy involving the reluctance of President George H.W. Bush to nominate to a Vermont district judgeship a candidate recommended by Senator James M. Jeffords (R-VT). "As a matter of custom and tradition in the Senate," Senator Cochran declared, "the senators of the president's party's recommendations for district court judgeships have been tantamount to selection of that nominee," adding that selecting judicial nominees was "one of the few patronage positions that senators have" outside their staffs.[18] Echoing Senator Cochran's views, the Senate Republican Conference, it was reported, "went to Jeffords' defense with a resolution asking conference chairman John H. Chafee (R-R.I.) to advise President Bush of the senators' support for Jeffords' choice."[19] Ultimately, the candidate recommended by Senator Jeffords was nominated by President Bush and confirmed by the Senate by a voice vote.[20]

The view of many Senators, in other words, has been that the President should defer to Senators of the President's party in the selection of home state judicial appointees, rather than vice versa. This view is reinforced by the custom of senatorial courtesy, in which the Senate as a collegial body customarily supports Senators of the President's party in disputes with the President over judicial appointments in their state.[21] The custom serves as an inducement to the President to try to reach accommodation with home state Senators, rather than risk Senate rejection of a nominee whom they oppose. As a result, Presidents rarely go forward with a nomination for a district court judgeship if a home state Senator of the President's party has indicated beforehand a readiness to oppose the nominee in the Senate.[22]

[17] Joseph W. Tydings, "Merit Selection for District Judges,"*Judicature*, vol. 61, Sept. 1977, p. 113. (Hereafter cited as Tydings, "Merit Selection.") By contrast, he noted (also at p. 113), "no single senator automatically controls" each circuit court of appeals judgeship, because each appellate court "generally covers several states."

[18] Ruth Marcus, "GOP Senators Feud with Administration over Naming Judges," *The Washington Post*, Nov. 23, 1989, p. A6. (Hereafter cited as Marcus, "GOP Senators Feud.")

[19] Ibid.

[20] See Walter R. Mears, "A Battle of Wills over Picking Federal Judges," *Associated Press*, Aug. 16, 1990, accessed Feb. 5, 2008, at http://www.lexisnexis.com.

[21] In some scholarly works, senatorial courtesy also has come to be synonymous with presidential deference to Senators over federal appointments in their states. See, for example, Michael J. Gerhardt, *The Federal Appointments Process; A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), p. 143: "Traditionally, the term *senatorial courtesy* has referred to the deference the president owes to the recommendations of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states." (Emphasis in original.)

[22] Occasionally, however, Presidents have selected district court nominees over the public opposition of home state Senators of the President's party, usually (but not always) with unhappy results for the Presidents and the nominees. In 1939, over the objections of Virginia's two Democratic Senators, President Franklin D. Roosevelt nominated Floyd H. Roberts to a judgeship on the U.S. District Court for the Western District of Virginia. The nomination ultimately was rejected by the Senate 72-9. See Harris, *Advice and Consent*, pp. 231-234. By contrast, in 1947 President Harry S Truman succeeded in having the nomination of Joe B. Dooley to the U.S. District Court for Northern Texas confirmed, over the objection of the junior Democratic Senator of Texas, W. Lee O'Daniel. (The Senator had been in disagreement with Texas's senior Senator, Tom Connally, also a Democrat, who had recommended the nominee.) The nomination was approved by the Senate Judiciary Committee by a 8-4 vote and confirmed by the Senate by a vote of 48-36. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), p. 80. (Hereafter cited as Goldman, *Picking Federal Judges*.) Subsequently, however, President Truman was unsuccessful when he transmitted four other district court nominations to the Senate, all over the objections of home state Senators of his party. The nominations in question—one each to the judicial districts of Northern Georgia and Southern Iowa in 1950, and two to the judicial district of Northern Illinois in 1951—were rejected by the Senate in voice votes. See again Harris, *Advice and Consent*, p. 221 (for the Georgia and Iowa district nominations) and pp. 321-323 (for the Illinois district nominations).

More recently, in 1976, President Gerald R. Ford, a Republican, nominated William B. Poff to the U.S. District Court (continued...)

The role of home state Senators of the President's party, however, is no longer one of unquestioned power to select district court nominees, as it has been generally portrayed in the past. A judicial appointments scholar observed in 1972 that "even granting that senators of the party in power may have 'owned' district judgeships at an earlier time in our history, they have not during the incumbency of the presidents since Truman."[23] In recent decades, Senators, when recommending judicial candidates, increasingly have found it necessary to accommodate new demands or calls from the President, which have made their selection power less absolute. For instance, recent Presidents have insisted that candidates whom Senators recommend for district judges, besides having necessary professional qualifications, meet other criteria of particular importance to the President[24] or that the Senators submit a number of candidates for a vacant judgeship, rather than only the name of the one candidate they most favor.[25] Further, one recent

(...continued)

for the Western District of Virginia over the objection of a home state Senator of the President's party. The Senator invoked senatorial courtesy, and the Senate Judiciary Committee tabled the nomination. A month later, President Ford withdrew the nomination (after receiving a letter from the nominee, who asked that his nomination be withdrawn because of the Senator's invocation of senatorial courtesy). Goldman, *Picking Federal Judges*, p. 210.

In 1980, President Jimmy Carter, a Democrat, nominated James E. Sheffield to the U.S. District Court for the Eastern District of Virginia, over the objection of Senator Harry F. Byrd Jr. of Virginia. Although Senator Byrd, formerly a Democrat, had become an Independent, he remained a member of the Senate's Democratic caucus, and was treated as a Democrat by President Carter for judicial selection purposes. (When President Carter, earlier in his presidency, wrote a letter to Democratic Senators, requesting that they appoint merit commissions to select candidates for vacant district judgeships in their states, he included Senator Byrd on his list.) Although the Sheffield nomination received a hearing by the Senate Judiciary Committee, controversy arose over the nominee's personal finances, as well as over the Carter Administration's efforts to persuade Senator Byrd to add more names to the list of candidates he had recommended for vacant Virginia judgeships. The Sheffield nomination received no further action in the Senate and was returned to the President in December 1980 upon the final adjournment of the 96th Congress. See "Sen. Byrd Pledges To Oppose Carter on Judge Choice," *The Washington Post*, April 17, 1980, p. C2; Karlyn Barker, "Tax Inquiry Snarls Hearings on Carter Nominee to Bench," *The Washington Post*, Aug. 27, 1980, p. A1; Donald P. Baker and Glenn Frankel, "A Litany of Mistakes; White House Defeated, Embarrassed in Fight To Appoint Black Va. Judge; Fight for Black Judge Embarrasses Carter," *The Washington Post*, Sept. 21, 1980, p. A1; Goldman, *Picking Federal Judges*, pp. 262-264.

[23] Chase, *Federal Judges*, p.12. "It does not necessarily follow," Chase continued, "that because individual senators may well be in a position to exercise a veto power in the appointment of judges they must do the appointing. Close examination of the appointment process suggests otherwise." Ibid., p. 13.

[24] For instance, in an executive order signed on Nov. 8, 1978, President Jimmy Carter specified (thus signaling to home state Senators) that, among the standards he would use to determine a person's fitness to serve as a district judge was whether the person possessed a "demonstrated commitment to equal justice." Also, under the order, the Attorney General, before recommending a district court candidate to the President, would consider whether an "affirmative action" had "been made, in the case of each vacancy, to identify candidates, including women and members of minority groups." U.S. President (Carter), "Standards and Guidelines for the Merit Selection of United States District Judges," Executive Order 12097, *Federal Register*, vol. 43, Nov. 13, 1978, p. 52455. (Executive order revoked by President Ronald Reagan on Feb. 25, 1986. See "Executive Orders Disposition Tables," at http://www.archives.gov/federal-register/codification/executive-orders-16.html, accessed Feb. 5, 2008.) During the presidency of Ronald Reagan, the Administration's evaluation of judicial candidates was, as a matter of policy, concerned not only with intellectual ability, legal experience, and judicial temperament, but also "with an individual's overall judicial philosophy and concept of the judicial role." Sheldon Goldman, "Reagan's Second Term Judicial Appointments: The Battle at Midway," *Judicature*, vol. 70, April-May 1987, p. 326. During the presidency of George W. Bush, a Department of Justice official involved in the process of evaluating candidates for lower court judgeships has spoken of the President's "mandate to us"—namely, "that the men and women who are nominated by him to be on the bench have his vison of the proper role of the judiciary. That is, a judiciary that will follow the law, not make the law, a judiciary that will interpret the constitution, not legislate from the bench." Sheldon Goldman et al., "W. Bush Remaking the Judiciary: Like Father Like Son?", *Judicature*, vol. 86, May-June 2003, p. 284. (Hereafter cited as Goldman et al., "W. Bush Remaking the Judiciary.")

[25] A 1996 study noted that "during the administration of Democratic President Jimmy Carter, home state senators were asked for more than one name for each district court vacancy in their state. That practice and other presidential attempts (continued...)

President (Jimmy Carter), through forceful advocacy, persuaded nearly all of the home state Senators of his party to establish nominating commissions for the selection of district court judges. In so doing, the Senators relinquished a substantial part of their traditional role in recruiting, evaluating, and recommending district court candidates.[26] Subsequent Presidents, however, have not insisted, as President Carter did, that Senators use nominating commissions to select district court candidates, and most Senators no longer do.[27]

Blue Slip Policy of Senate Judiciary Committee

Senatorial courtesy, as has been shown, historically has contemplated a role for Senators of the President's party in providing advice to the President on nominees—but not necessarily a role for opposition party Senators. Nevertheless, even when neither of a state's Senators is of the President's party, a consultative role is contemplated, if not mandated, for them in the appointment process by means of the Senate Judiciary Committee's "blue slip" policy. Under the committee's blue slip policy, as it has evolved in recent decades, the Judiciary Committee has come to expect that, as a courtesy, a state's Senators, no matter what their party affiliation, will be consulted by the Administration prior to the President nominating persons to U.S. district judgeships in the state as well as to U.S. circuit court judgeships historically associated with the state.

The blue slip policy of the Senate Judiciary Committee, as set by its chair, dates back at least to 1917.[28] Under this policy, the committee chair seeks the assessment of Senators regarding district court, circuit court, U.S. attorney, and U.S. marshal nominations in their state. In practice, the chair sends a blue-colored form to home state Senators regarding these nominations. If a home state Senator has no objection to a nominee, the blue slip is returned to the chair with a positive response; however, if a Senator has some objection to the nominee and wants to stop or slow committee action, he or she can decide not to return the blue slip or to return it with a negative

(...continued)

to curb senatorial patronage over lower federal court judgeships continued under Republican Presidents Ronald Reagan and George [H. W.] Bush," although "with limited success." Miller Center Commission on the Selection of Federal Judges, *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges* (Charlottesville, VA: Miller Center of Public Affairs, University of Virginia, 1996), p. 4.

[26] See Alan Neff, *The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates* (Chicago: American Judicature Society, 1981), 203 p. (Hereafter cited as Neff,*United States District Judge Nominating Commissions*.) See also Charles W. Hucker, "Report Card on Judicial Merit Selection," *Congressional Quarterly Weekly Report*, vol. 37, Feb. 3, 1979, pp. 189-191. President Carter's advocacy, one news report noted, included issuance of an executive order "urging senators to voluntarily forego their patronage prerogatives and establish commissions for the selection of U.S. district court judges on the basis of merit." Alan Berlow, "Carter Order Raises Doubts Whether Judges Will Be Selected on Merit Basis," *Congressional Quarterly Weekly Report*, vol. 36, Nov. 18, 1978, p. 3313.

[27] The current use of outside nominating commissions by some Senators to evaluate and recommend judicial candidates is discussed in more detail later in this report, under the heading "Procedures Used to Identify and Evaluate Candidates."

[28] See CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger. See also Sarah A. Binder, "Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip," *Studies in American Political Development*, vol. 21, March 2007, pp. 1-15. (Hereafter cited as Binder, "Where Do Institutions Come From?")

response.[29] Some, but not all, chairs of the Judiciary Committee have required a return of a positive blue slip by both of a state's Senators before allowing consideration of a nomination.

For more than two decades, from 1956 through 1978, when a Senator returned a negative blue slip or failed to return a blue slip for a judicial nomination, it was the policy of the committee chair, in deference to the Senator, to decline to schedule a hearing or other committee action on the nomination.[30] In other words, a home state Senator, by not returning a blue slip or by returning it with a negative response, could halt all further action on a nominee from the state. This policy, in effect, gave Senators of either party, if they wished to exercise it through the blue slip, a veto over any home state judicial nomination to which they were opposed.[31] In so doing, the committee policy, some scholars have suggested, also had the effect of encouraging presidential administrations to consult beforehand with Senators of the opposition party, as well as of the President's party, to be sure that they would not oppose a person being considered for a judicial nomination in the state in question.[32]

Since 1979, however, deference to home state Senators using the blue slip to block or delay judicial nominees has not always been automatic. While some chairs of the Judiciary Committee, including Senator Patrick J. Leahy (D-VT) in the 110th Congress, have permitted committee action on a judicial nomination only when both home state Senators returned positive slips, the committee under other chairs, by contrast, has considered a judicial nomination with receipt of only one positive blue slip,[33] or on a few occasions, without a blue slip from either home state Senator."[34]

While the blue slip policies of various recent chairs of the Judiciary Committee have varied, nearly all policies, when articulated in writing, have communicated to the President the importance of pre-nomination consultation with both home state Senators.[35] Pre-nomination consultation, a 2003 analysis concluded:

[29] CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, p. 4.

[30] Ibid., p. 9.

[31] By contrast, prior to 1956, during the first four decades of the Judiciary Committee's blue slip policy, "no chair of the Judiciary Committee allowed any negative blue slips to automatically veto a nomination." Instead, judicial nominations prompting negative blue slips from home state Senators received committee hearings and even, in some cases, were reported by the committee to the full Senate. These episodes appeared to show that the committee's policy, during this time, "was that a negative blue slip was not intended to prevent committee action. Instead, a Senator's negative assessment of a nominee was meant to express to the committee his views on the nominee so that the chairman would be better prepared to deal with the review of the nomination. The end result was that Judiciary Committee chairmen did not traditionally view a negative blue slip as a sign to stop all action on judicial nominations." Ibid. p. 9.

[32] See, for example, in Brannon P. Denning, "The Judicial Confirmation Process and the Blue Slip," *Judicature*, vol. 85, March-April 2002, pp. 218-226, the following quote, at p. 222: "Just making known [to the administration] that the senator is opposed and would, if the person is nominated, withhold the blue slip, sends a powerful signal that trouble is in the offing. Then the administration must decide whether or not it wants to pick a fight. With judicial nominations, then, the Senate has created an effective procedure for ensuring that its 'advice' is sought by the president prior to the announcement of a nomination.... " See also Binder, "Where Do Institutions Come From?", who, at p. 1, observed that the blue slip "allows home state senators to influence the course of nominations prospectively—encouraging presidents to heed the preferences of home state senators in selecting new federal judges."

[33] CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, pp. 11-14, 24.

[34] Ibid., pp. 13, 22; Binder, "Where Do Institutions Come From?," p. 15, note 53.

[35] For example, Sen. Joseph R. Biden, Jr. (D-DE), Judiciary Committee chairman from 1987 to 1994, in a 1989 letter to President George H.W. Bush emphasized the importance of the President's Administration consulting "with both home (continued...)

> has been a key expectation of recent [Judiciary Committee] chairmen in the evaluation of negative blue slips. The President is now expected to consult and involve each home state Senator in the pre-nomination phase of the selection process. Without evidence of consultation by the White House, various chairmen have appeared, as a matter of policy, to accord greater value to a negative blue slip submitted by a non-consulted home state Senator.[36]

Moreover, the role contemplated for Senators not of the President's party, when engaging in pre-nomination consultation with the President, has been expanded. Official blue slip policy statements by recent chairs of the Judiciary Committee, for instance, have not only called for the opportunity for opposition party Senators to express opinions about judgeship candidates being considered by the Administration, but also the opportunity to propose their *own* candidates to the Administration.[37]

In sum, the Judiciary Committee's blue slip policy in recent decades, as applied in somewhat varying ways by different chairs, appears always intended to promote some measure of an advisory role for home state Senators of both parties in the judicial nominee selection process. Moreover, the contemplated advisory role has included the opportunity, if Senators wish, to make recommendations to the President about whom to nominate. As a caveat, however, it should be kept in mind that the blue slip policy is set by the committee's chair and is not a part of the committee's written rules. As a result, the policy's key elements, including the degree of importance placed on Administration consultation with home state Senators, is always subject to change, in keeping with the prerogatives of the committee chair.

(...continued)

state Senators prior to submitting the nomination to the Senate." If such "good faith consultation" did not take place, he said, "the Judiciary Committee will treat the return of a negative blue slip by a home state Senator as dispositive and the nominee will not be considered." Sen. Joseph R. Biden Jr., letter to President George H.W. Bush, The White House, June 6, 1989.

Sen. Orrin G. Hatch (R-UT), the committee's chairman from 1995 to 2001 and again from 2003 to 2004, wrote in 1997 to the White House counsel to President William J. Clinton that "the Senate expects genuine, good faith consultation by the Administration with home state Senators before a judicial nomination is made, and the Administration's failure to consult in genuine good faith with both home state Senators itself is grounds for a Senator's return of a negative blue slip. Where the Administration has failed to provide good faith pre-nomination consultation, a negative blue slip is treated as dispositive, and precludes Committee consideration of a judicial nominee." Sen. Orrin G. Hatch, letter to Charles F.C. Ruff, counsel to the President, The White House, Apr. 16, 1997.

Sen. Patrick J. Leahy (D-VT), the committee's chairman from 2001-2002, was reported as having said, in an June 6, 2001, interview, that "unless he is satisfied that both senators from the home state of a nominee have been consulted by the Bush administration, a nomination will not move." Elizabeth A. Palmer, "Senate GOP Backs Down from Dispute over Handling of Nominees," *CQ Weekly*, vol. 59, June 9, 2001, p. 1360.

[36] CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, p. 25.

[37] For instance, in his 1997 letter to the White House counsel to President William Clinton, Sen. Orrin G. Hatch (R-UT), chairman of the Judiciary Committee, listed five circumstances indicating "an absence of good faith consultation" by the White House with home state Senators. One of the five circumstances, he said, was the "failure to give serious consideration to individuals proposed by home state Senators as possible nominees." Sen. Orrin G. Hatch, letter to Charles F.C. Ruff, counsel to the President, April 16, 1997. For a listing of all five "circumstances" in Sen. Hatch's letter, see CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, pp. 15-16.

Senators' Party Affiliations and Their Recommending Role

The political party affiliations of a state's Senators usually, if not always, are an important determinant of what role they play in the selection of federal judicial nominees in their state. As a general rule, a Senator who belongs to the President's party has the primary role in recommending candidates for federal district court judgeships in the home state, and an influential, if not the primary, role in recommending candidates for federal circuit court judgeships associated with the home state. These, as a general rule, are in contrast to the much lesser roles in recommending district and circuit court candidates played by a Senator who is of the opposite party. If both of a state's Senators are of the President's party, they usually, although not always, share the responsibility of recommending judicial candidates to the President. If neither Senator is of the President's party, some other official or officials in their state typically assume the primary role of recommending judicial candidates. Senators not of the President's party, however, sometimes are in a position to establish for themselves a more influential role in recommending judicial candidates than as just described. This particularly might prove to be the case if the Senators are perceived by the Administration as having the ability and likely inclination to block nominations in the Senate (either in committee or on the floor) unless afforded an enhanced role in judicial nominee selection.

When One Senator Is of the President's Party

As already discussed,[38] Senators of the President's party, by well-established custom, are the key persons who provide the President's Administration with recommendations for U.S. district court judgeships in their state. One authority on the judicial appointments process, writing in 1987, noted:

A senator of the president's party expects to be able to influence heavily the selection of a federal district judgeship in the senator's state; indeed, most such senators insist on being able to pick these judges, and they expect judgeships on the federal courts of appeals going to persons from their states to be "cleared" by them.... [39]

When only one of a state's Senators is of the President's party, he or she alone, by custom, is entitled to select all candidates for district judgeships in that state. If the Administration has concerns about a Senator's recommendation, it is expected to resolve those concerns with the Senator. If the Administration continues to have a problem with a candidate, finding him or her unacceptable as a nominee, the Senator, and not any other official outside the Administration, is called on to provide a different recommendation. If the Administration prefers its own candidate, it in turn must persuade the Senator to agree to its choice. For the Administration to do otherwise, and push forward with a nominee objected to by the Senator, is to risk rejection by the Senate, given the custom of senatorial courtesy, discussed earlier. The latter scenario is very rare,

[38] See earlier section in this report under the heading "Senatorial Courtesy."

[39] Sheldon Goldman, "Judicial Selection," in Robert J. Janosik, ed., *Encyclopedia of the American Judicial System: Studies of the Principal Institutions and Processes of Law*, 3 vols. (New York, Scribner, 1987), vol. 2, p. 589. (Hereafter cited as Goldman, in *Encyclopedia of American Judicial System*.)

however, for "[n]o administration deliberately seeks to alienate senators of their own party or to run the risk of a senator's sabotaging a nomination once it has been sent to the Senate."[40]

When only one of a state's Senators is of the President's party, that Senator will have almost complete discretion as to whether or how to consult with the state's other Senator about judicial nominations. There is no requirement that the former consult with the latter, and some Senators in such a situation may decline to consult with their home state colleague in any way. On the other hand, many Senators in such situations have consulted with their home state colleague, in various ways, and some have gone so far as to involve them in a joint or coordinated process of recommending judicial candidates to the President.[41] The following list notes some options available to a Senator of the President's party when considering whether or how to consult or cooperate with a home state colleague of the opposite party about judicial nominee recommendations. The options are not exhaustive but, rather, identify different degrees of consultation or cooperation about judicial candidates that can exist between home state Senators of opposite political parties:

- The Senator of the President's party makes recommendations to the Administration without consulting the other home state Senator at any stage—apprising the latter neither of persons under consideration early in the process nor of persons actually recommended later in the process.
- The Senator as a courtesy informs the other home state Senator of the person whom the former has recommended for a judicial nomination, without, however, soliciting the latter's views about the candidate or about other possible candidates.
- The Senator informs the other home state Senator of persons under consideration as potential judicial nominees, welcoming input from the latter about these candidates as well as suggestions as to other possible candidates.
- The Senator agrees to allow the other home state Senator to select a minority of the members of an advisory panel which evaluates and screens judicial candidates before the first Senator decides whom to recommend.

[40] Ibid., p. 590.

[41] For example, in 10 states during the Carter presidency (1977-1980), a scholar has noted, Senators "who were not in the president's party played a significant role in selection by establishing or co-cosponsoring nominating commissions." Neff, *United States District Judge Nominating Commissions*, p. 20. In a long-standing arrangement in New York, when that state had both a Republican and a Democratic Senator, the Senator of the President's party customarily proposed candidates for three out of every four vacancies in the federal district courts located in New York, with the other Senator proposing a candidate to fill the fourth judicial vacancy. For a fuller description of the arrangement in New York, see Federal Bar Council Committee on Second Circuit Courts, "Judicial Vacancies: The Processing of Judicial Candidates: Why It Takes So Long and How It Could Be Shortened," *Federal Rules Decisions*, v. 128, Jan. 1990, p. 145. More recently at the start of the presidency of George W. Bush, in 2001, Nevada's two Senators (one Republican and the other Democrat) announced an agreement in which the latter Senator would recommend candidates for one out of every four district court vacancies occurring in the state (an arrangement described as based on the bipartisan arrangement, just discussed, that was in effect for many years in New York). Matthew Tully and Emily Pierce, "Senators Work Out Novel Agreements on Judiciary Posts," *CQ Daily Monitor*, June 13, 2001, p. 5. The same story reported that a "similar agreement" had been reached by the Senators from Illinois (one a Republican, the other a Democrat) for making judicial nominee recommendations.

- The Senator shares the recommending function with the other home state Senator, allowing the latter to select candidates for a minority of the judgeships which become vacant in the state (for example, for every fourth judgeship).
- The two Senators work as co-equals in the selection process—for example, by using a completely bipartisan panel or commission to identify and screen applicants, and with all candidate recommendations to the President made by the Senators jointly.

These options, as mentioned, are almost entirely at the discretion of the Senator of the President's party, with his or her views about the judicial appointment process largely determining the extent to which there will be consultation or cooperation with the other home state Senator. Such views, in turn, may be influenced by the immediate political environment, including (1) the nature of working relations between the two Senators in general (e.g., strained or cordial); (2) the past practices of Senators in the state regarding judicial patronage (i.e., whether Senators in the state previously worked closely together on judicial appointments); (3) the degree of Administration support for consultation or cooperation between Senators of opposite political parties on home state appointments;[42] and (4) the extent to which the other Senator is perceived as able or inclined to block home state nominations either in committee or in the full Senate.[43]

When Both Senators Are of the President's Party

If both of a state's Senators are of the President's party, they may share the role of recommending judicial candidates to the President or, alternately, one of them may take the lead role. Senatorial custom, particularly in recent decades, provides ample support for both Senators having an active role in recommending judicial candidates in their states, if each wishes to participate in the process.[44]

In many states in which both home state Senators are of the President's party, both may be engaged in evaluating and selecting judicial candidates. One option within this arrangement is for both Senators to review and evaluate judicial candidates for every judicial vacancy that arises in their state. At their discretion, the Senators may use an informal process to select candidates, for

[42] An administration might generally regard bipartisan cooperation between home state Senators on judicial nominations as politically beneficial, insofar as it paves the way for bipartisan support for these nominations in the Senate. Sometimes, however, an administration might regard cooperation as going too far—for instance, when the Senator of the other party is allowed to assume the role of recommending candidates for some of the state's judicial nominations and the Senator then makes recommendations of which the Administration disapproves. In such instances, an administration might feel it does not have to accept these recommendations or reach accommodations with the Senator on a mutually acceptable choice, as an administration typically would in its interactions with the home state Senator of the President's party.

[43] The ability of opposition party Senators to block lower court nominations from their state will be particularly enhanced if their party is in the Senate majority and if the chair of the Judiciary Committee or the Senate majority leader is prepared to support the Senators in opposition to a home state nomination.

[44] Indicative of this custom was a survey in early 1993, during the first months of Democrat William J. Clinton's presidency, of staff in Senate offices on methods used to select candidates for district judgeships. At that time,18 states were represented by two Democratic Senators. Of these 18 states, 11 were identified in the survey as having both of their Senators jointly involved in the selection of judicial candidates, while in five other states one of the Senators was identified as the "chief sponsor" or as "taking the lead" in the selection process. (In the two other states, the Senators had yet to decide on what selection process they would use.) *Citizen's Handbook Supplement: A State-by-State Guide to Federal Judicial Selection* (Washington: Alliance for Justice, April 1993), 15 p. (Hereafter cited as *Citizen's Handbook Supplement.*) (Copy of pamphlet available from author.)

example, relying on their personal knowledge of likely candidates or on input from close advisers or friends in the legal community. Alternately, they may use a more formal process, for example, relying on advisory panels to review applications, interview candidates and make recommendations for the Senators to choose from. At the end of the screening process, the Senators may agree on one or more candidates to recommend to the President for the judgeship, or, if they cannot reach agreement, they might combine their individual recommendations into one list to submit to the Administration.

Another option, by contrast, is for both Senators to be active in the judicial candidate selection process, but to take turns—alternating in the role every time there is a court vacancy in their state. Alternating, from the workload standpoint (in time required to screen judicial candidates), might appear more attractive for Senators in states having a relatively large number of district judgeships, where vacancies occur periodically. It, however, might appear less attractive for Senators in states having only a handful of district judgeships, where vacancies occur infrequently. Senators agreeing to alternate may decide, individually, to select candidates through either an informal or a formal process (as described in the previous paragraph). In cases where both Senators wish to rely on advisory panels to screen candidates, they have the choice of using joint panels (which serve on behalf of both Senators—with each Senator typically choosing some of the panel's members) or of using their own separate panels. At the end of such an alternating screening process, only the Senator involved submits a recommendation (or a list of recommendations) to the President for the vacant judgeship in question.

Sometimes, however, in a state having two Senators of the President's party, one Senator may opt out of an active role in recommending judicial candidates, leaving the task primarily to his or her home state colleague. A Senator might do so for a variety of reasons—lack of interest in judicial appointments, insufficient time available for the role (given other Senate responsibilities), or out of deference to the state's other Senator, due to the latter's seniority, interests, committee assignments, or greater experience in evaluating judicial candidates. In such cases, the more involved Senator, proceeding alone as the lead Senator, may review the backgrounds and qualifications of judicial applicants with informal support or input from others or, in a more formal arrangement, receive evaluations of the applicants, or recommendations, from an advisory panel established specifically on behalf of the Senator to screen judicial candidates.

At one or more points during the screening process, the lead Senator can be expected to consult with the other Senator—especially at the point at which the latter can be advised of the candidate or candidates whom the lead Senator believes should be recommended or who have received advisory panel recommendations. The lead Senator, before finalizing his or her choice of a candidate, will want the other Senator's approval—or, failing that, at the very least the other Senator's willingness not to object to the candidate's nomination later.[45] Once a candidate is selected, the actual recommendation may be made singly, by the lead Senator, or jointly, by both Senators. Likewise, a public statement noting a candidate's nomination by the President may be made solely by the lead Senator or jointly by both Senators.

[45] This endorsement, or commitment not to oppose, is essential to assure that the nomination will not later be blocked by the second Senator either in the Senate Judiciary Committee (through non-return of a blue slip or return of a negative blue slip) or, in the event the nomination were reported by the committee, on the Senate floor (by invoking senatorial courtesy).

If both of the state's Senators are of the President's party, the prospects for a district court candidate's nomination in that state are bolstered if both Senators have recommended that candidate to the President. A scholar on the judicial appointment process has noted:

> If there are two senators of the president's party from a particular state, [Justice] department arithmetic has it that the effect of two senators wanting a particular man for a district judgeship in their state is more than one plus one. The sum is more like infinity, for it would only be with great trepidation that the president's men would attempt to counter the will of both senators.[46]

When Neither Senator Is of the President's Party

If neither Senator in a state is of the President's party, each usually, by custom, plays at most only a secondary role in recommending judicial candidates for the President's consideration, with the primary role assumed by other officials from the state who are of the President's party. On occasion, however, exceptions to this rule do occur, with a President sometimes acquiescing to active senatorial participation in judicial candidate selection in states having two opposition party Senators. On other occasions, an agreed-upon arrangement in a state might be that while officials of the President's party would be the ones recommending judicial candidates, the state's opposition party Senators would exercise a veto power over any recommendations they found objectionable.

The Customary Model: Officials in the State Who Are of the President's Party Play the Primary Recommending Role

By custom, when neither of a state's Senators is of the President's party, the primary role in recommending candidates for district court judgeships is assumed by officials in the state who are of the President's party. Historically, in the absence of a Senator of the President's party, the state official or officials who most frequently have exercised the judicial "patronage" function have been the most senior member, or one of the most senior members, of the party's House of Representatives delegation, the House party delegation as a whole, the governor, or state party officials. In any given state, one of these officials may exercise the recommending function exclusively, or share it with one or more of the others.

A survey published in April 1993 illustrates the customary options used to select candidates for district judgeships in states not having Senators of the President's party. The survey, by the interest group Alliance for Justice, was published shortly after the start of the presidency of William J. Clinton in January 1993. It was based primarily on interviews with staff members in the offices of Democratic Senators and House members, with additional information obtained through interviews of Democratic Party officials. At the time of the survey, there were 11 states in which neither Senator was a Democrat. In one of the 11 states, a judicial candidate selection process was not yet in place, and no judicial vacancies were pending there. In the other 10 states, according to the survey, judicial selection procedures were set or being put in place. The numerical breakdown of these 10 states, according to the type of Democratic official acting as the "chief sponsor" of judicial candidates, was as follows:

[46] Chase, *Federal Judges*, p. 37.

- 5 states—a House of Representatives Member;
- 2 states—the governor;
- 2 states—a House of Representatives Member and the governor;
- 1 state—the U.S. Department of Agriculture Secretary.[47]
- In June 1993, a few months after the survey's publication, another state, Texas, joined the ranks of states in which neither Senator was of the President's party. (This occurred when a Republican was elected to a Senate seat in a special election, giving Texas two Republican Senators.) At that point, it was reported, "the traditional authority to make recommendations to the President fell to ... Texas's senior congressional Democrat"[48] (the state's senior Democratic House Member).[49]
- Likewise, at the start of presidency of George W. Bush, a Republican, in January 2001, the new Administration looked to other than senatorial sources for advice on judicial candidates in states having two opposition party Senators. The *Legal Times* reported that in "the 18 states where both senators are Democrats, Bush will be getting advice on potential nominees from a high-ranking Republican House member or the state's Republican governor."[50] Without listing the selection methods for each of the 18 states, the article noted, as examples, that in two of the states a senior Republican House member would be working together with the Republican governor on judicial recommendations, while in a third state a Republican House member expected to be the President's "point man on judicial nominations."[51]
- By custom, the role of a state's Senators in judicial candidate selection, when neither is of the President's party, is secondary to the role of those officials discussed above, who actually choose candidates to recommend to the President. Customarily, in these circumstances, the state's Senators, if they are consulted by state officials of the President's party, are consulted for their reactions to candidates under consideration, but not for their own preferences. Where consultations of this sort are done in good faith, negative as well as positive feedback from the Senators would be welcomed, but typically they would not be called upon to make their own candidate recommendations.[52] As a scholarly study has noted, until recent decades:

[47] *Citizen's Handbook Supplement*, pp. 3-15. The Secretary of Agriculture, identified by the survey as the chief sponsor for federal judicial candidates in Mississippi, was Mike Espy, who, prior to his appointment as Secretary of Agriculture, served as a Democratic Member of the U.S. House of Representatives for six years.

[48] R.G. Ratcliffe, "Lawmaker's Tip a Curve to Clinton; Brooks Recommends Other Judge for Post," *The Houston Chronicle*, Nov. 18, 1993, p. A29.

[49] In January 1995, however, under a new dean, the state's Democratic House Members shared among themselves the recommending role—creating four panels, for each of the state's four judicial districts, to recommend district court candidates to the President. See Steve McGonigle, "Gonzalez Parcels Out Responsibility for Making Federal Judicial Selections; Representatives to Recommend Candidates for their Regions," *The Dallas Morning News*, Dec. 18, 1994, p. 10A; William E. Clayton Jr., "Jurist Nominees To Be Picked in New Process; Texas Federal Judgeships Are First Test, *The Houston Chronicle*, Jan. 16, 1995, p. A5.

[50] Jonathan Ringel, "GOP Senators Ready to Enter the Judges Game," *Legal Times*, vol. 24, Jan. 22, 2001, p. 6.

[51] Ibid., p. 8.

[52] Of course, if the Senators objected to a candidate under consideration, their views might often be expected to carry (continued...)

> ... senators who were not of the president's party in any given administration played little or no role in district judge selection, except as permitted in informal agreements between senators and any given administration or by the Senate Judiciary Committee through the blue slip. Moreover, that role described above was generally a negative role: a senator who was not of the President's party from the state in which a judicial nominee would serve could delay or prevent confirmation of a nominee by refusing to return the blue slip, but the senator could not compel the President to choose his or her candidates.[53]

The secondary role of Senators in judicial candidate selection in states where both are of the opposition party was stated as formal Administration policy early in Ronald Reagan's presidency. In a March 1981 memorandum on judicial selection procedures, the Department of Justice discussed, among other things, the procedure that would apply in states with no Republican Senators. In these cases, the memorandum said:

> ... the Attorney General will solicit suggestions and recommendations from the Republican members of the congressional delegation, who will act in such instances as a group, in lieu of Senators from their respective states. It is presumed that congressional members in such cases would consult with Democratic Senators from their respective states.[54]

Exceptions to the Customary Model, Where Senators Play a Primary Recommending Role

Sometimes, however, in states having two opposition party Senators, Presidents agree to a more active form of senatorial involvement in judicial selection. In these cases, a more active role for a state's Senators might consist of actually serving as a primary source for judicial candidate recommendations or selecting at least some of the members of an advisory panel or commission, if one is established in cooperation with officials of the President's party to make judicial candidate recommendations.

In recent decades, various Presidents, in a limited number of situations, have allowed a state's Senators, when both were of the opposition party, an involvement in judicial candidate selection entailing more than simply being consulted during the selection process. For example, in states having two opposition party Senators, President John F. Kennedy, a scholar has written, was sometimes inclined to select persons of the opposition party for judicial appointments. In these situation:

> President Kennedy used Republican Minority Leader Everett Dirksen as a liaison between the White House and Republican senators. Dirksen was asked to solicit suggestions from the senators in those states which had two Republican senators, though suggestions of names made directly by the senators were accorded equal treatment.[55]

(...continued)

weight with the Administration, in light of the formidable opposition they could mount against home state nominations later in the Senate Judiciary Committee or on the Senate floor.

[53] Neff, *United States District Judge Nominating Commissions*, p. 20.

[54] "Department of Justice; Memorandum on Judicial Selection Procedures, 3/2/1981," *United States Law Week*, vol. 49, no. 37, 1981, p. 2604. For another source for full text of the memorandum, see "The Attorney General's Memorandum on Judicial Selection Procedures," *Judicature*, vol. 64, April 1981, p. 428.

[55] Joel B. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: John Wiley and Sons, Inc., 1965), p. 30.

During the presidency of Gerald R. Ford, a Republican, Florida's two Democratic Senators increased their involvement in the selection of federal district judges in that state—through establishment of a commission to recruit and evaluate judicial candidates. The nine-member Federal Judicial Nominating Commission, which began operations in 1975, was created and chartered by the state of Florida, at the impetus of the two Senators, in conjunction with the state bar association. Under the charter, each of the three sponsors—the two Senators and the bar association—chose one commissioner from each of Florida's three federal judicial districts.[56] After evaluating applicants, the commission was to recommend not fewer than five candidates per vacancy to the Senators, who would then recommend one candidate for each vacancy.[57] In its first year of operation, the commission recommended candidates for nomination for two district court vacancies and one circuit court vacancy. President Ford and the Florida Senators cooperated to fill two of three vacancies with nominees selected from the commission's candidates.[58] In 1976, the second year of the commission's operation, and President Ford's last full year in office, the President continued to accept and select his nominees from the commission's candidates.[59] The Florida commission marked "the first time in more than 135 years" that Senators "who were not in the President's party played a substantial formal role at the stage before the official nominations of persons for district court judgeships."[60]

Other Senators of the opposition party also, on occasion, have successfully bargained for power over judicial patronage. During the presidency of Richard M. Nixon, a Republican, California's two Democratic Senators, it was reported, reached an agreement with the Administration that every third federal judgeship in that state would go to a judicial candidate suggested by the Senators.[61] More recently, in a number of states, the Administration of President William J. Clinton, a Democrat, spent "considerable time," according to one legal scholar, "treating Republican senators' demands that they be involved" in judicial candidate selection.[62] In a few of these states, Republican Senators "insisted that they be permitted to participate in choosing the candidates and even that they [were] entitled to propose nominees."[63]

Most recently, the Republican Administration of President George W. Bush, in a few cases, has accepted a formal role for a state's two Democratic Senators in judicial candidate selection. In at

[56] The commission charter excluded officers of the state's political parties from membership as commissioners. This provision, a scholar observed, "could be read as attempting to oust Florida's Republican officials from participation in selection during the Republican administration in office at that time." Neff, *United States District Judge Nominating Commissions*, p. 21

[57] "It is significant," Neff wrote, "that the commission reported to its sponsoring senators rather than directly to the President." Ibid.

[58] Ibid., p. 23. Neff did not identify which of the three vacancies was not filled by a nominee recommended by the commission or provide any details explaining the commission's non-involvement in filling that vacancy.

[59] Ibid., pp. 23-24.

[60] Ibid., p. 24.

[61] Nina Totenberg, "Will Judges Be Chosen Rationally?" *Judicature*, vol. 60, Aug.-Sept. 1976, p. 95.

[62] Carl Tobias, "Federal Judicial Selection in a Time of Divided Government," *Emory Law Journal*, vol. 47, Spring 1998, p. 543.

[63] Ibid. Providing a similar perspective, a former assistant attorney general, in a 2002 symposium, noted that, in the Clinton Administration, "we did try to make arrangements and accommodations with Republican senators. It became a matter of necessity when we reached the point in a number of quarters of the country where we were looking at states and circuits with lots of Republican senators, some of whom absolutely refused to consider any person put forward by President Clinton at the district or circuit court level." Eleanor D. Acheson, former assistant attorney general, Office of Policy Development, quoted in "Selecting Federal Judges: The Role and Responsibilities of the Executive Branch," *Judicature*, vol. 86, July-Aug. 2002, p. 17.

least four instances, the Bush Administration reportedly reached understandings with opposition party Senators to engage in a judicial selection process largely, if not entirely, reliant on candidate recommendations made by judicial nominating commissions from the Senators' states. These understandings were reached when the states involved—California, Florida, Washington, and Wisconsin—were represented by two Democratic Senators.[64]

In each of the aforementioned four states, the role of opposition party Senators in the selection process has entailed more than simply being consulted about possible nominees. In each state, a judicial nominating commission was established prior to, or during, the Bush presidency, to evaluate the qualifications of judicial candidates and to make nominee recommendations—with the Senators, in each case, responsible for selecting at least some of the commission's members. After a commission made its evaluations, its recommendations were forwarded to the Senators for their review. (A commission's recommendations, in some of the states, also were reviewed by House Members of the President's party.) In turn, the Senators were afforded the opportunity to indicate which candidates they preferred, before those names were forwarded to the President.[65]

In another kind of arrangement for a state, officials of the President's party would be the ones recommending judicial candidates, but with the state's opposition party Senators exercising a veto power over any recommendations they found objectionable. Such an arrangement, for instance, according to Illinois's two Democratic Senators, has been in place in their state during the current Bush Administration.[66]

[64] See Sen. Dianne Feinstein, "Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel," news release, May 22, 2001, accessed Feb. 5, 2008, at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html; Sen. Bob Graham, "White House Commits to Honor Florida Nominating System; Graham Says Judiciary Needs to Maintain Independence," news release, March 12, 2003 (copy available from author); Katherine Pfleger, "Senators, White House Might Be Close to Resolution on Federal Judicial Nominee," Associated Press, March 18, 2002, accessed Feb. 5, 2008, at http://www.lexisnexis.com; "Murray, Cantwell to Form Panel," *The Seattle Times*, March 19, 2002, p. B3; Sen. Herb Kohl, "Kohl, Feingold Announce Activation of Wisconsin Federal Nominating Commission," news release, June 25, 2003 (copy available from author); and Eric J. Frommer, "White House Nominates Wisconsin State Judge for Federal Judgeship," Associated Press, Nov. 14, 2003, accessed Feb. 5, 2008, at http://www.lexisnexis.com.

As of January 2005, it should be noted, Florida ceased to be represented by two opposition party Senators, following that state's election of a Republican to the Senate in November 2004. Thereafter, as a result, the primary role for selecting members of Florida's judicial nominating commission, as well as for reviewing and forwarding the commission's candidate recommendations to the White House, was assumed by a Senator of the President's party.

[65] Also, in at least one of the states, Wisconsin, the Senators retained the prerogative to block from being forwarded to the President any commission recommendation of which they might disapprove. See David Callender, "Sykes Is 7th Circuit Finalist; Bush to Make Pick for Appeals Court," *The Capital Times & Washington State Journal*, Aug. 5, 2003, p. 3A.

[66] In recent floor remarks during Senate consideration of a district court nomination, one of Illinois's two Democratic Senators noted that the nominee had been recommended by the leader of that state's Republican House delegation, "with the understanding he faced a veto" if either of the Senators objected. Sen. Richard J. Durbin, "Nomination of Robert M. Dow, Jr., To Be United States District Judge for the Northern District of Illinois," remarks in the Senate, *Congressional Record*, daily edition, vol. 153, Nov. 13, 2007, p. S14238. The state's other Senator stated that the nomination had "continued the bipartisan approach to filling judgeships in the Federal district courts—an approach that has served Illinois well." Sen. Barack Obama, "Nomination of Robert M. Dow, Jr., To Be United States District Judge for the Northern District of Illinois," remarks in the Senate, *Congressional Record*, daily edition, vol. 153, Nov. 13, 2007, p. S14239.

Lesser Role for Senators When Recommending Circuit Court Candidates

Senators in general exert less influence over the selection of circuit court nominees than over selection of district court nominees. Whereas home state Senators of the President's party often, if not always, dictate whom the President nominates to district judgeships, their recommendations for circuit court nominees, by contrast, typically compete with names suggested to the Administration by other sources or generated by the Administration on its own.

The lesser role for Senators, and the more independent role of the President, in the selection of circuit court nominees is well established by custom. In a landmark 1953 study of the appointment process, the President was said to have "a much freer hand in the selection of judges of the circuit courts of appeal, whose districts cover several states, than of district judges, who serve within individual states."[67] In 1971, during the presidency of Richard M. Nixon, a scholar wrote, "When it comes to making appointments to circuit courts, the balance of power shifts markedly [away from Senators] to favor decision-making by the President's men."[68]

In a 1977 analysis, a former U.S. Senator observed that, while many Senators had the "power" to select district court nominees from their states, "no single senator automatically controls" who is appointed to circuit judgeships.[69] The Senator's statement proved to be an understatement, for during the years of Jimmy Carter's presidency (1977-1980), his Administration relied almost entirely upon a circuit judge nominating commission to identify candidates for circuit court nominations. In so doing, the Administration largely excluded home state Senators of the President's party from the process of recommending persons for circuit judgeships. (The Senators, however, were consulted for their views about the commission's recommendations before President Carter actually selected a nominee.)[70]

President Ronald Reagan disbanded the circuit judge nominating commission created by President Carter, which restored for home state Senators a role in recommending circuit court candidates.[71] The role, however, was not a dominant one, for during the Reagan presidency, one scholar has written, the process for selecting circuit nominees was marked by "tight administration control over the screening process."[72]

[67] Harris, *Advice and Consent*, p. 314.

[68] Chase, *Federal Judges*, p. 43.

[69] Tydings, "Merit Selection," p. 113.

[70] See Goldman, *Picking Federal Judges*, pp. 238-241. Goldman recounted that President Carter created the commission through Executive Order 11972, and that the commission "consisted of thirteen eleven-member panels appointed by the president (one for each judicial circuit, with the exception of the large Fifth and Ninth circuits which were split geographically with eastern and western Fifth Circuit panels and northern and southern Ninth Circuit panels)." Ibid., p. 238. See also W. Gary Fowler, "Judicial Selection under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures," *Judicature*, vol. 67, Dec.-Jan.1984, pp. 267-268.

[71] In disbanding the commission, President Reagan "ordered a return to the pre-Carter method of selection, with senators and others recommending people to the Justice Department." Sheldon Goldman, "Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image," *Judicature*, vol. 66, March 1983, p. 342.

[72] Goldman, *Picking Federal Judges*, p. 291.

At the start of the Clinton presidency, in 1993, a somewhat similar picture was portrayed of Senators playing a subordinate role to the Administration when identifying candidates for circuit court judgeships. In comparison with their role in recommending district court nominees, a report found, Senators were said to "have less influence over the President's selection of nominees to the 12 circuit courts"—with Senators free to "suggest [circuit] candidates to the White House," but with the President "traditionally not bound by such suggestions."[73] At the end of the Clinton presidency, an outgoing Department of Justice official noted that, while Senators usually "pretty much decided" who was nominated for district court judgeships, the appellate court selections were "primarily controlled, decided by the White House and the Justice Department, mostly the White House.... "[74]

Subsequently, in the presidency of George W. Bush (2001-present), the role of Senators in recommending circuit court nominees continued, as a general rule, to be less significant than their role in recommending district court nominees: The names of circuit nominees have tended "to be generated more by the Administration" than by Senators,[75] with instances of Senators having President Bush select their candidates for circuit judgeships being exceptions to the rule.[76]

Eleven of the 13 U.S. circuit courts of appeals,[77] it will be recalled, are geographically based courts encompassing three or more states. In each of these circuit courts, many of the seats on the bench have traditionally been linked to a particular state. "And historically, overwhelmingly," one scholar has observed, "the majority of replacement appointments for appeals court vacancies have, indeed, gone to judges from the state in which the vacancy arose."[78] Hence, each time one of these judgeships is vacated, Senators of the state involved usually can be expected to cite the tradition of the "state seat" and seek, through their own candidate recommendations, to preserve the judgeship for a nominee from their state.[79] For their part, Presidents in recent decades usually, but not always, have been inclined to make a circuit court appointment in keeping with the "state seat" tradition, by selecting a nominee from the same state as the vacating judge.[80]

[73] Alliance for Justice Judicial Selection Project, *Justice in the Making: A Citizen's Handbook for Choosing Federal Judges* (Washington: Alliance for Justice, 1993), p. 9. (Copy available from author.)

[74] "Clinton Nominee Kent Markus: Judicial Delays Are Hurting the Country," nationaljournal.com, June 20, 2001, "Insider Interview," accessed on Feb. 5, 2008, at http://nationaljournal.com/. Markus, who had served in the Department of Justice as a counselor to Attorney General Janet Reno, was nominated by President Clinton to the U.S. Court of Appeals for the Sixth Circuit on Feb. 9, 2000. His nomination, however, received no action in the Senate and was returned to the President on Dec. 15, 2000, at the end of the 106th Congress.

[75] Goldman et al., "W. Bush Remaking the Judiciary," p. 285.

[76] For mentions of a few instances in which Senators succeeded in having President Bush nominate someone recommended by them to circuit court judgeships, see Mitchel A. Sollenberger, "The Law: The President 'Shall Nominate': Exclusive or Shared Constitutional Power?," *Presidential Studies Quarterly*, vol. 36, Dec. 2006, p. 725.

[77] As discussed earlier, there is also a twelfth geographically based federal court of appeals—the U.S. Court of Appeals for the District of Columbia—which, like the other 11 geographically based circuit courts, considers appeals of federal trial court cases decided within the circuit. A thirteenth federal court of appeals, the U.S. Court of Appeals for the Federal Circuit, is headquartered in Washington, D.C., but unlike the other 12 circuit courts, has nationwide jurisdiction defined by subject matter.

[78] Elliot E. Slotnick, "A Historical Perspective on Federal Judicial Selection," *Judicature*, vol. 86, July-Aug. 2002, pp. 14-15.

[79] The Senators might point to other considerations as well to justify filling the court vacancy with a representative of their state. They might, for instance, advance the argument that the various states in the circuit should be proportionally represented, with each having a certain minimal number of judges on the court, to insure adequate representation based on each state's population or the proportion of the court's overall caseload originating from the state.

[80] A CRS report updated on Sept. 4, 2007, found that, from the presidency of Lyndon B. Johnson (1963-1969) to the (continued...)

While Presidents usually observe the traditions of state seats on the circuit courts, in most cases they are not required to do so. A President will be required to select a resident from a particular state for a circuit court vacancy only when necessary to assure that the court is represented by at least one appointee from that state.[81] In all other circumstances, a President is free to appoint a resident from any state within the circuit to a judgeship, in spite of any historical association a particular state might have with the judgeship. This latitude of the President, to select a circuit court nominee from candidates in more than one state, prevents Senators from being able to assert an absolute claim for their state over any circuit judgeship (unless the judgeship's vacancy would leave the Senators' state without representation on the circuit). When a President selects a different state to be represented by a circuit judgeship, he in effect gives the senatorial prerogatives associated with the judgeship to a different pair of Senators.

While Senators usually are not the dominant or decisive players in the process of selecting circuit court nominees, they, nonetheless, do enjoy certain prerogatives in the process. Once a judgeship in a circuit becomes vacant, Senators in states falling within the circuit are free to suggest names to the President's Administration regarding possible nominees. If the Administration has indicated which state it wants the judgeship to represent—whether in keeping with a traditional state seat or in a break with that tradition—the Senators of that state, if they are of the President's party, customarily are among those who recommend candidates for the judgeship. Senators of the President's party, one authority has written, "expect judgeships on the federal courts of appeals going to persons from their states to be 'cleared' by them.... "[82] If the home state Senators are not of the President's party, they nonetheless have expectations—based on the Senate Judiciary Committee's long-standing blue slip policy—that they, too, will be consulted by the Administration for their views about the prospective nominee.

Perhaps the most forceful input Senators can provide to a President's Administration regarding potential circuit court nominees is strong disapproval of a particular candidate from their state. If the candidate is nominated in spite of their objections, the Senators, whether of the President's party or not, will have important Senate traditions in their favor if they decide to oppose the nominee in the Senate. If they are of the President's party, the Senators know (and the Administration will know as well) that they have the tradition of senatorial courtesy to call upon. As one scholar has noted, Senators can invoke senatorial courtesy effectively against a circuit court nominations, provided they are of the President's party and the nominee is a resident of their state.[83] Hence, input from such Senators in forceful opposition to the candidate amounts to a "negative recommendation" that the Administration should take very seriously, to avoid Senate rejection of the candidate based on senatorial courtesy.

(...continued)

update of that report, 86% of appointments to the circuit courts had been of nominees who, at the time of their appointment, were residents of the same state as the vacating judges' state of residence at the time of appointment.CRS Report RS22510, *"State Representation" in Appointments to Federal Courts of Appeals*, by R. Sam Garrett and Kevin M. Scott.

[81] A federal statute that has been in effect since 1997 provides that every state must be represented by at least one judge on the circuit court of appeals that geographically encompasses it. Specifically, it provides that "[i]n each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit." 28 U.S.C. §44(c); 111 Stat. 2493; P.L. 105-119, sec. 307.

[82] Goldman, in *Encyclopedia of American Judicial System*, p. 589.

[83] Chase, *Federal Judges*, pp. 43-44.

Senators who are not of the President's party, by contrast, ordinarily would not be expected to invoke senatorial courtesy to oppose a circuit court nominee from their state. They, however, can take advantage of the Senate Judiciary Committee's blue slip procedure to bolster their opposition. In the event a candidate objectionable to them is nominated, the Senators, as discussed above, may register their disapproval at the committee stage by declining to return a blue slip or returning a negative blue slip to the Judiciary Committee. Such action by a home state Senator, experience has shown, can jeopardize or doom a nomination, depending on the blue slip policy of the committee's chair.

During some chairmanships in recent decades, the policy of the Judiciary Committee has been to allow, in some instances, committee consideration of a judicial nomination receiving a negative blue slip, or no blue slip, from one or both of the nominee's home state Senators.[84] When such a policy is in effect, a Senator's negative blue slip, or failure to return a positive blue slip, does not foreclose the possibility of the committee reporting the nomination to the Senate. It, however, at the very least, draws the committee's attention to the concerns of the home state Senator and to the question of what degree of courtesy the members of the committee owe that Senator's concerns.

A nomination is much more in jeopardy when the Judiciary Committee policy in effect is not to consider any nomination for which a home state Senator has not returned a positive blue slip. When such is the committee's policy, a home state Senator's opposition to a judicial nomination, through use of the blue slip, eliminates any chance of its being reported out of committee (in effect killing the nomination), unless the Senator can be persuaded to drop his or her opposition.

Accordingly, when both of a state's Senators are of the opposition party and they object to a circuit court candidate from their state, their opposition might persuade the President not to nominate the candidate. In turn, the Senators also might succeed in influencing the President to nominate another individual from their state who is more acceptable to them. However, a President, if dissuaded from nominating the candidate objected to by the Senators, may then consider nominating an individual from another state in the circuit. In the event the President chooses this option, the Administration will no longer have to engage in consultation with the same Senators regarding the vacant judgeship, because they would no longer be the nomination's home state Senators. The home state Senators, with whom the Administration would be expected to consult, would now be the Senators of the state of the new circuit court candidate.[85]

[84] See CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, pp. 13, 22; Binder, "Where Do Institutions Come From?," p. 15, note 53; and Seth Stern, "Saad Nomination Advances Despite Senate 'Blue Slips," *Congressional Quarterly Weekly*, vol. 62, June 18, 2004, p. 1479.

[85] For the President, however, a consideration against nominating someone from a state other than that of the vacating judge will be the likelihood of controversy arising over the change in "state representation." In recent episodes in the Senate, involving a circuit court nominee whose state of residence was different from that of the vacating judge (or, in one instance, different from that of the vacating judge at the time that judge was nominated), the Senators representing the state of the vacating judge publicly objected on state representation grounds, and the nominations failed to be confirmed. See "Background" section of CRS Report RS22510, *"State Representation" in Appointments to Federal Courts of Appeals.* See also Spencer S. Hsu, "Senators Delay Vote on Va. Bench Nominee; Sarbanes, Mikulski Want a Md. Appointee," *The Washington Post*, July 10, 2004, p. B1; Sen. Dianne Feinstein, "Statement by Senator Dianne Feinstein on the Nomination of Randy Smith to the 9th Circuit Court of Appeals," news release, March 1, 2006, accessed Feb. 5, 2008, at http://feinstein.senate.gov/; "Most Say Boise Lawyer Who Is Up for Seat on 9th Circuit Has Little Chance of Being Approved by Democratic Congress," *The Idaho Statesman*, Dec. 13, 2006, accessed Dec. 13, 2006, at http://www.idahostatesman.com. See also remarks by Sen. Patrick J. Leahy discussing the failure of a Virginian to be confirmed to a circuit judgeship vacated by a Marylander and the success of an Idahoan in being (continued...)

Selecting Judicial Candidates to Recommend

Learning of the Vacancy

For a home state Senator, the process of selecting a lower court judicial candidate typically begins when the Senator's office learns that a judgeship is, or soon will become, vacant. A judicial vacancy is created when a judicial officeholder vacates the office (for example, by retirement, resignation, elevation to a higher court, or death) or when legislation is enacted creating a new judgeship. Depending on the circumstances, a current or future judicial vacancy will be brought to the attention of a home state Senator by the outgoing judge, by the Administration, or on the initiative of the Senator's office. The typical practice of circuit and district judges is to give notice of their planned retirements months in advance.[86]

Sometimes Senators learn of an upcoming judicial vacancy when a circuit or district judge from their state, as a courtesy, alerts the Senators beforehand of the judge's intention to retire. White House or Department of Justice officials responsible for advising the President on judicial appointments also can be expected to notify a Senator's office of a judicial vacancy in the Senator's state—particularly if the Senator is of the President's party—and to invite the Senator to make recommendations of candidates to fill the judgeship. In this initial contact, or soon thereafter, the Administration might also inform the Senator of its preferences concerning candidates and the selection process: These preferences, for example, might include the number of recommendations the Senator is expected to submit, the qualification standards that the Senator's candidates must meet, and the time frame in which the Senator is expected to submit recommendations to the Administration. Also, in this preliminary outreach to the Senator, the Administration might discuss paperwork requirements, such as the background questionnaires that eventually will have to be filled out by any candidate that the Senator selects.

A Senator, however, does not have to wait to hear from outgoing judges or the Administration to be informed of current or upcoming judicial vacancies. On its own initiative, a Senator's office can visit the federal judiciary's Internet website[87] to identify district and circuit court judgeships which currently are vacant or are scheduled to be vacated in the future. Within the judiciary's website are hypertext links to several vacancy lists, including one of current court vacancies, and

(...continued)

confirmed to a circuit judgeship vacated by an Idahoan (following controversy, however, over his earlier unsuccessful nomination to a circuit judgeship which California's Senators maintained was a "California seat"). Specifically, see Sen. Leahy's remarks in "Nomination of Sandra Segal Ikuta To Be United States Circuit Judge for the Ninth Circuit," *Congressional Record*, daily edition, vol. 152, June 19, 2006, pp. S6053-S6054, and in "Norman Randy Smith To Be United States Circuit Judge for the Ninth Circuit," *Congressional Record*, daily edition, vol. 153, Feb. 15, 2007, p. S 1986 (each statement discussing both the Virginia-Maryland and Idaho-California controversies).

[86] In March 2003, the federal judiciary's governing body, the Judicial Conference of the United States, adopted a committee recommendation, in which it "strongly urge[d] all judges to notify the President and the Administrative Office of the United States Courts as far in advance as possible of a change in status, preferably 12 months before the contemplated date of change in status." Prior to that, retiring judges and those taking senior status had been encouraged by the Conference to provide "substantial (i.e., six-month or one-year) advance notice of that action." U.S. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States*, March 18, 2003, pp. 20-21, accessed Feb. 5, 2008, at http://www.uscourts.gov/judconfindex.html.

[87] The federal judiciary's website is located at http://www.uscourts.gov/.

another of future court vacancies, both arranged by judicial circuit.[88] In both lists, a Senator or the Senator's staff will readily find, under the heading of the judicial circuit in which the Senator's state is located, any circuit judgeships, as well as any district judgeships within the Senator's state, which are currently vacant or are scheduled to be vacated at a specified future date.

Of course, a Senator is free, if he or she chooses, to initiate a judicial candidate selection process, or to compile a list of prospective judicial candidates, before learning that a judgeship is vacant or scheduled to become vacant. Some Senators, particularly those representing a state having many lower federal court judgeships—where vacancies might be expected to occur periodically—might find it advantageous to be ready at any time, with names of judicial candidates to recommend.

Relationship with the Other Home State Senator

A key variable affecting the role of a Senator in selecting candidates for federal judgeships will be the state's other Senator. As discussed above, the extent to which the two Senators will share the judicial selection role will depend, to a great extent, on their respective prerogatives and interests in this area. One Senator might have more prerogatives to select judicial candidates than the other, particularly if he or she is of the President's party and the other is not. Further, if one Senator has far more experience or expertise in selecting judicial candidates, the other Senator might be inclined to defer to the more senior colleague in recommending persons to federal judgeships. In addition, one Senator might be very interested in the judicial selection process, while the other might, because of other priorities in the Senate, have less interest in this area. If the prerogatives and interests of a state's Senators in selecting judicial candidates are roughly equal (e.g., they are both of the President's party, have about the same amount of Senate seniority, and are both interested in recommending judicial candidates to the President), sharing the candidate selection role in some way seems almost inevitable.

First Option: Only One Senator Would Be Actively Involved in Selecting Judicial Candidates

Within this approach, the other Senator, if he or she wished, could be afforded the opportunity to clear or review any candidate selections, prior to their being recommended to the Administration, as well as to join the selecting Senator in formally recommending candidates. This option might be suitable not only in various situations where only one home state Senator is of the President's party, but also where both Senators are of the President's party yet only one wishes to be actively involved in the judicial selection process.

Second Option: The Two Senators Apportion between Themselves the Selection of Candidates

This option could be taken by alternating the selection role, with the Senators taking turns selecting a candidate each time a lower court vacancy arises in their state. A variation on this approach would be for one Senator to select candidates for a majority of the judgeship vacancies

[88] Within the website, a list of current district and circuit court vacancies can be accessed at http://www.uscourts.gov/judicialvac.html, as can a list of future court vacancies (including, for each judgeship in question, the date that the vacancy will take effect).

that occur and for the other Senator to select candidates for a minority (for example, for every third or fourth judicial vacancy); this arrangement, as noted earlier, might be suitable in situations where a Senator of the President's party is willing to share the candidate recommending role with a home state Senator of the other party. Also, Senators in states having more than one federal judicial district could apportion between themselves the selection of judicial candidates according to judicial district—for example, with candidates in one district selected by one Senator and candidates in the second district selected by the other Senator.

Third Option: The Two Senators Work Together in Selecting Each Candidate

This arrangement could consist of active involvement of both Senator's offices in each phase, or in most phases, of the candidate selection process, for example, announcing vacancies and inviting candidates to apply, reviewing candidate applications, interviewing applicants, and selecting one or more candidates to recommend to the Administration. Alternately, if the Senators were too busy to involve themselves with each phase of the candidate selection process, and did not wish to assign their personal office staff to selection process tasks, they could delegate much of the selection role to an outside screening committee, panel, or commission.[89] In such a delegated arrangement, the Senators might be most involved in the earliest and latest phases of the selection process—in the beginning, when they would share in appointing members to the screening panel, and at the end of the process, when they both would weigh the panel's candidate recommendations.

Criteria Used to Select Judicial Candidates

Senators might use a number of criteria to determine the fitness of persons from their state who seek to be recommended for U.S. district or U.S. circuit court judgeships. Ordinarily, two sets of criteria can be expected to be most important in governing the Senators' choices—first, the standards explicitly set by the Administration for judicial candidates, and second, the personal criteria that the Senators themselves are inclined to use when deciding whether prospective candidates merit recommendation to the President.

In recent decades, various Presidents have issued guidelines or made public statements regarding the qualification standards that their judicial nominees must meet. Virtually every President has emphasized the importance of a nominee meeting high professional standards and having the ability to be impartial as a judge. At the same time, each President has underscored that judicial nominees must conform with the basic values or ideals that the President believes are inherent in the Constitution, as well as with the President's views of what a judge's fundamental role and priorities should be in our nation's constitutional system. Such perspectives on the Constitution have tended to vary somewhat from one President to the next—with some Presidents, for example, emphasizing the limited role of a judge in our constitutional system (i.e., whose role is to "interpret" rather than to "make" the law) and others emphasizing the role of judges in safeguarding constitutional and legal protections of citizens' rights.

[89] The current use by some Senators of outside judicial nominating commissions to evaluate and recommend judicial candidates is discussed in more detail later in this report, under the heading "Procedures Used To Identify and Evaluate Candidates."

Further, some Presidents also have set various representational standards or goals for Senators to meet when selecting judicial candidates, endorsing, for instance, the goal of increasing the representation of women and persons of minority ethnicity in the lower federal courts. Elaboration of what qualities an administration looks for in judicial candidates also can come from White House or Department of Justice officials who are involved in the judicial selection process. A Senator seeking to select judicial candidates acceptable to the President will necessarily want to take into account any qualification requirements expressed by the President or other key Administration officials.

Senators also will have their own considerations or criteria to guide them in selecting judicial candidates. Ideally, in nearly all cases, a fundamental starting requirement for a Senator engaged in the search for judicial candidates will be that any person selected have the professional qualifications, integrity, and judicial temperament needed to perform capably as a federal judge. Forming a backdrop to each Senator's search will be "the custom to appoint lawyers who have distinguished themselves professionally—or at least not to appoint those obviously without merit."[90] Accordingly, in many cases, a judicial candidate will, as part of the Senator's selection process, be evaluated or rated by a local or state bar association or some other kind of informal or formal panel of lawyers called upon specifically to evaluate the candidate's professional qualifications. A Senator should be mindful that, once he or she has recommended a judicial candidate to the President, the candidate's qualifications will be closely investigated by Administration personnel involved in advising the President on whether the candidate should be nominated. The nominee's qualifications also will be exhaustively examined by the American Bar Association's Standing Committee on the Federal Judiciary, either in the selection process prior to nomination or immediately after the nomination is made.[91] Finally, the nomination will be scrutinized yet again, by staff of the Senate Judiciary Committee, upon Senate receipt of the nomination from the President.

Also, a Senator likely will be guided by at least some political party considerations in the judicial candidate search. Traditionally, the overwhelming majority of all federal judicial nominees come from the same party as the nominating President, with more than half of all federal judges having been "'politically active' before their appointments."[92] The tradition of selecting candidates having the same party affiliation as the President is linked to political patronage concerns of home state Senators of the President's party. In this context, a home state Senator in some instances might regard a judgeship recommendation, at least in part, as "a reward for major service" to the party, the President or the Senator.[93] A scholarly study of the judicial appointment process cites two reasons why most nominees for judicial office "must have some record of political activity.... ":

[90] Robert A. Carp and Ronald Stidham, *Judicial Process in America*, 3d ed. (Washington: CQ Press, 1996), p. 240. (Hereafter cited as Carp and Stidham, *Judicial Process*) Merit, the authors continue, "may mean no more than an association with a prestigious law firm, publication of a few law review articles, or respect among fellow attorneys; a potential judge need not necessarily be an outstanding legal scholar. Nevertheless, one of the unwritten codes is that a judicial appointment is different from run-of-the-mill patronage," with tradition creating "an expectation that the would-be judge have some reputation for professional competence." Ibid., pp. 240-241.

[91] For detailed information on the process by which the ABA committee investigates and evaluates a judicial nominee, see, on the ABA's website, the background booklet entitled *American Bar Association Standing Committee on the Federal Judiciary: What It Is and How It Work*s, accessed Feb. 5, 2008, at http://www.abanet.org/scfedjud/.

[92] Carp and Stidham, *Judicial Process*, p. 241.

[93] Ibid.

> First, to some degree judgeships are still considered part of the political patronage system; those who have served the party are more likely to be rewarded with a federal post than those who have not paid their dues. Second, even if a judgeship is not given as a direct political payoff, some political activity on the part of a would-be judge is often necessary, because otherwise the candidate would simply not be visible to the president or senators(s) or local party leaders who send forth the names of candidates. If the judicial power brokers have never heard of a particular lawyer because that attorney has no political profile, his or her name will not come to mind when a vacancy occurs on the bench.[94]

A Senator also may evaluate the suitability of a judicial candidate according to whether certain groups or constituencies are adequately represented on the district or circuit court in question. Among the representational considerations a Senator might take into account are a candidates's ethnicity, religion, gender, and place of residence. For instance, at the time a particular judicial vacancy occurs, a Senator might be concerned with increasing the representation of a certain ethnic group on that court, to make its membership more representative of the population of the Senator's state, or of that part of the state in which the judicial district is situated. Another concern of the Senator, for example, might be to assure that membership in the district court or courts in the Senator's state represent all of the state's geographic regions.

Senators, as well, may sometimes use philosophical or ideological criteria to evaluate judicial candidates. In applying such criteria, a Senator might be concerned with what values—legal, constitutional, political, social, economic, and philosophical—would underlie a candidate's reasoning and decision making as a judge, and whether, in light of these values, the candidate would approach cases with impartiality or with prejudgment. A Senator also might be concerned with gauging how the candidate ultimately might decide certain kinds of legal or constitutional issues (especially any issues about which the Senator personally feels strongly), or in what general direction the candidate might move a court if joined with judges of similar views. Applying such criteria, a Senator might find a judicial candidate acceptable if his or her orientation appeared sufficiently compatible with the Senator's. The exact philosophical or ideological criteria applied would vary among Senators, reflecting their individual views regarding the courts, the Constitution, and public policy.[95]

Procedures Used to Identify and Evaluate Candidates

Senators have great discretion as to the procedures they will follow in identifying and evaluating candidates for appointment to federal judgeships. These may range over a wide spectrum of options—from procedures that are extremely informal, unstructured, and totally dependent on a Senator's individual judgment, to those formalized, structured, and reliant on judgments of others beside the Senator. A Senator, for instance, may view his or her role in selecting a judicial candidate as essentially making a personal choice, with any input from others being informal in nature and not in any way limiting the Senator's involvement in the search for candidates. By contrast, at the other end of the spectrum, a Senator may use a formally constituted advisory body

[94] Ibid., p. 242.

[95] In recent years, Senators have expressed different views on whether it is appropriate to evaluate judicial nominees by their ideology, judicial philosophy, or views on specific issues. A notable instance of this was a June 26, 2001, hearing held by a Senate Judiciary subcommittee on the question," Judicial Nominations 2001: Should Ideology Matter?" For the complete record of that hearing, see U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *The Judicial Nomination and Confirmation Process*, hearings, 107th Cong., 1st sess., June 26 and Sept. 4, 2001 (Washington: GPO, 2002), pp. 1-109.

of individuals, such as a nominating commission, not only to identify and evaluate judicial candidates, but also to make recommendations that would be binding on the Senator or that the Senator ordinarily would be expected to follow.

A Senator, as well, may take a procedural approach that falls somewhere between the two just described or that has elements of each. For instance, a Senator may use the services of a formal committee of expert advisers to identify and evaluate judicial candidates, but with the understanding that the committee's recommendations are advisory only, and not in any way binding on the Senator.[96]

In a November 12, 2003, floor speech, a Senator illustrated, from his own experience, the discretion and flexibility Senators have to tailor their own personal approach to judicial candidate selection. In the speech, made during an extended Senate debate on judicial nominations,[97] the Senator stated that, over the course of his Senate career, he saw himself as bearing the following responsibility—that if "you are going to make [judicial] recommendations to the President of the United States, do so with care."[98] He described two somewhat different approaches that he had taken during his tenure to identify candidates for lower court judgeships in his state. In the first 25 years of his Senate career, he noted,

> I appointed a nominating committee ... made up principally of very distinguished attorneys and judicial figures for whom I had respect and from all over my state. I knew these people commanded respect, and they were very helpful in identifying, each time a judicial vacancy occurred, several nominees.
>
> Without fail, I presented all of these nominees to the president, and his staff sifted through them and in each case came up with one of the nominees, frequently the one recommended first by the panel.[99]

In 2002, however, upon learning that two U.S. district court judges in his state would be retiring, the Senator took a different approach to identifying judicial candidates.[100] On this occasion, he said, he wrote letters to the press throughout his state. In the letters, he outlined all the of the qualifications he saw needed for a federal judge and invited "every well-qualified person to

[96] Senate financial management regulations, it should be noted, anticipate that some Senators will use advisory panels or groups to assist them in selecting judicial candidates. The regulations provide, in part, that individuals "who are not Senate employees selected by Senators to serve on a panel or other body making recommendations for nominees to Federal judgeships, service academies, U.S. Attorneys or U.S. Marshals may be reimbursed for transportation, per diem, and for certain other expenses incurred in performing duties as a member of such panel or other body." U.S. Congress, Senate Committee on Rules and Administration, *United States Senate Handbook* (Washington: United States Senate, Nov. 2006), p. IV-43.

[97] The speech was one made by many Senators during 40 hours of continuous Senate debate concerned with the judicial appointment process and with whether to close debate on three controversial circuit court nominations. The debate, which began in the evening of Wednesday, Nov. 12, 2003, concluded on the morning of Friday, Nov. 14, 2003, when the Senate voted against motions to close debate on the circuit court nominations of Priscilla Richman Owen of Texas, Carolyn B. Kuhl of California, and Janice R. Brown, also of California. For the entirety of the 40-hour debate, see *Congressional Record*, daily edition, vol. 149, Nov. 12, 2003, pp. S14528-S14785.

[98] Sen. Richard G. Lugar, "Executive Session," remarks in the Senate, *Congressional Record*, daily edition, vol. 149, Nov. 12, 2003, p. S14677.

[99] Ibid.

[100] In taking this different approach, the Senator said he "appreciated that those vacancies ... were going to come in to the particular milieu about which we are now talking," i.e., an atmosphere in the Senate Judiciary Committee of heightened conflict over judicial nominations. Ibid.

apply." Over the course of four months, "15 serious candidates emerged." After reading all of their applications, he interviewed five of the candidates—with a principal interest in their professional skills, as well as in their "characterization of how they would fulfill their responsibilities." From the five interviewed candidates, the Senator submitted three names to the White House, and two of those persons were nominated by the President (and subsequently confirmed by the Senate).[101]

As mentioned above, another option for Senators is to delegate all or some of their power to evaluate and recommend candidates for federal judgeships to judicial nominating commissions (sometimes also referred to as "merit commissions"). Such commissions are ordinarily created by Senators for the specifically stated purpose of identifying and recommending highly qualified persons for federal judicial appointment.[102] While the structure and operations of nominating commissions vary, most have the following features in common:

- They have been formally, and publicly, constituted by one or both of their state's Senators (or by predecessor Senators of their state).
- They have a specific number of members, who have been publicly identified.
- Each commission has a clearly defined mission.
- Each publishes notices of judicial vacancies and invites applicants.
- The applicants fill out a standard application form or questionnaire and are evaluated according to procedures that are the same for each application.
- Applications must be submitted, and the commission's evaluation of applications completed, by specified deadlines.
- The commission recommends not one but several candidates for a judicial position (forwarding the names either to the home state Senators or directly to the President).
- Typically, commission memberships include prominent attorneys in the state or local bar, and sometimes leaders of other community groups, and they often, if not always, represent both political parties.[103]

[101] Ibid.

[102] For instance, in announcing the creation of such a commission in 2001, a Senator declared, "It is my hope that this Committee can bring forward the best and most qualified candidates for the federal bench and provide a bipartisan balance that can lead to speedy approval by the Senate." Sen. Dianne Feinstein, "Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel," news release, May 22, 2001, accessed Dec. 3, 2007, at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html.

[103] For thumbnail descriptions of the structure and operations of nominating commissions currently used in the federal judicial selection process in certain states, see http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FDsee, accessed Feb. 5, 2008. For comprehensive state-by-state information on the structure and operations of nominating commissions used by U.S. Senators in the lower court selection process during the presidency of Jimmy Carter, see Neff, *United States District Judge Nominating Commissions.*

A sound rationale for nominating commissions, a recent study concluded, is that they "can be forums of genuine, constructive consultation in the initial phase of nominee selection" and help Senators and the President "strain out fringe candidates with more political clout than potential judicial ability." Russell Wheeler, "Prevent Federal Court Nomination Battles: De-Escalating the Conflict over the Judiciary," Brookings Institution Position Paper, Nov. 20, 2007, p. 12, accessed Feb. 5, 2008, at http://www.brookings.edu/. Hereafter cited as Wheeler, "Prevent Federal Court Nomination Battles.")

- The advent of widespread use of nominating commissions to identify candidates for federal judgeships came with the presidency of Jimmy Carter, who, at the start of his Administration in 1977, urged every Democratic senator to establish a commission for the selection of candidates for U.S. district judge positions.[104] By 1980, the last full year of the Carter presidency, senatorial commissions were operating in 31 states.[105]
- Although President Reagan in 1981 disbanded the commission created by President Carter to identify circuit court candidates,[106] his Attorney General urged Republican Senators to use commissions (as Democratic Senators had done during the previous four years) to screen candidates for district court judgeships.[107] While senatorial use of nominating commissions is no longer widespread, a Brookings Institution study in November 2007 reported that "[t]oday, 16 senators in eight states use them; in five both senators are Democrats." The study found that most of the present-day commissions had bipartisan memberships, a circumstance attributed to political necessity:

  > Bipartisan commission membership is essential in this period of polarized politics, with both majority and minority senators ready and able to contest nominations. Realizing this, the Democratic senators who use commissions today appoint some Republican members, named either by themselves or by state Republican leaders, similar to what Republican senators did during the Carter administration.[108]

Senators who use nominating commissions to identify and evaluate judicial candidates often, if not always, require their commissions to follow clearly defined rules of procedure. In Wisconsin, where its two Democratic Senators have chartered a commission to advise them in the selection of candidates to fill U.S. district court vacancies in that state—as well as for vacancies for U.S. attorneys in Wisconsin and U.S. circuit court judgeships "which are appropriately considered Wisconsin seats"—the charter lays out the rules of procedure in detail. The charter provides that the commission shall consist of 11 members in the case of district court and U.S. attorney vacancies, or 12 members in the case of a circuit court vacancy. The number of members that each Senator may appoint to the commission varies, depending on whether the Senator is of the same political party as the President.[109] When a court vacancy occurs, the charter provides

[104] Goldman, *Picking Federal Judges*, p. 244, observing that before 1977 Senators "from only two states (Florida in 1974 and Kentucky in 1976) had commissions."

[105] Ibid.

[106] Ibid., p. 290.

[107] A March 1981 Department of Justice memorandum by Attorney General William French Smith encouraged Senators to utilize "screening mechanisms"—which it said included "advisory groups or commissions"—to "ensure that highly qualified candidates are recommended." "Department of Justice; Memorandum on Judicial Selection Procedures, 3/2/1981," *United States Law Week*, vol. 49, no. 37, 1981, p. 2604. See also Stuart Taylor Jr., "Smith Issues Rules for Naming Judges," *The New York Times*, March 7, 1981, sec. 1, p. 11.

[108] Wheeler, "Prevent Federal Court Nomination Battles," pp. 13-14.

[109] When both Senators are of the same political party as the President, four members are appointed by each Senator; when one Senator is of the same political party as the President, five members are appointed by that Senator, with three members appointed by the other Senator; and when both Senators are of the opposite political party as the President, two members are appointed by each senator, with four members of the commission appointed "by the most senior elected official of the President's party." In all three situations just noted, two more members are appointed by the state bar of Wisconsin. In the case of district judge or U.S. attorney appointments, the eleventh member of the commission is appointed by the dean of the University of Wisconsin Law School, or the dean's designee, for consideration of vacancies in the Western District of Wisconsin, or by the dean of the Marquette University Law School, or the dean's (continued...)

specific timetables for seeking candidates and accepting applications, as well as for evaluating the candidates' qualifications. Further, the charter sets organizational and voting procedures for the commission's members, including a quorum requirement and the number of affirmative votes required to recommend a candidate for nomination. Finally, it states that after the commission has designated not less than four nor more than six individuals as best qualified to fill a vacancy, the commission shall immediately notify the state's Senators as to the names of the individuals.[110]

In the above example, use of a nominating commission can be seen as largely removing Senators from the initial search for judicial candidates as well as from the evaluation of all of the candidates who initially submit applications. The arrangement, however, retains for the Senators the opportunity to evaluate the smaller number of applicants who ultimately are recommended by the commission. Further, the Senators are not required by the language of the commission's charter to forward to the President every commission recommendation that they receive. Absent a commitment to be bound by a merit panel's recommendations, Senators retain the discretion to further inquire, on their own, into the qualifications of persons recommended by the commission and to pass along to the President only those recommendations that they find acceptable.[111]

Interaction with Administration During Nominee Selection Process

Administration Entities and Their Roles

In every presidential Administration in recent decades, there has been an office assigned principal responsibility for consulting with Senators regarding judicial appointments in their state. When a federal judgeship in a Senator's state becomes vacant, or there is the imminent prospect of a vacancy occurring, a frequent scenario will find the Senator or top aides to the Senator in contact with, or contacted by, this office. In some recent Administration, the role of consulting with Senators about judicial appointments was performed primarily by officials in the Department of Justice. During the presidency of George W. Bush, however, the White House counsel's office has played the primary liaison role with Senators regarding judicial appointments.[112] As the primary

(...continued)

designee, for vacancies in the Eastern District of Wisconsin. In the case of circuit court appointments, the commission's eleventh and twelfth members are the deans of both law schools, or their designees.

[110] "Wisconsin Federal Nominating Commission Charter," 5 p. (Copy obtained from the offices of Senators Herb Kohl and Russell D. Feingold.)

[111] In some past instances, Senators have reportedly considered themselves bound to accept, and pass along to the President, the recommendations of their nominating commissions. A study of judicial selection during the presidency of Jimmy Carter, when senatorial use of nominating commissions was widespread, found that the commissions could be divided into two groups—"based on whether the commissions submitted their lists of candidates directly to the executive branch without alteration by their sponsors, or to their sponsors, who reserved the right to reduce the lists and submit smaller lists of selected candidates to the executive branch. In 17 states, senators chose to take their commissions' lists and select one or more candidates from their lists for each vacancy." Neff, *United States District Judge Nominating Commissions*, p. 65.

[112] A Department of Justice official involved in the judicial selection process during the first two years of George W. Bush's presidency explained, in a Jan. 6, 2003, interview with scholars, that the "outreach to senators, the liaisons for senators, are done by the White House Counsel's office.... The White House Counsel's Office handles the contact and consultations to all home state senators, even on circuit courts, and even if the person is from the opposite party." (continued...)

consultative link with Senators, it is this office that ordinarily receives Senators' recommendations of specific individuals for judicial appointment.

In recent presidencies, the task of evaluating the background and qualifications of judicial candidates has been performed by an informal committee of staff persons from the White House counsel's office and the Department of Justice. The committee, aided by the research of subordinate White House or DOJ staff, as well as by investigations of the Federal Bureau of Investigation (FBI) into the backgrounds of judicial candidates, decides which candidates to recommend to the President for nomination. In recent presidencies, the selection process has consisted of a number of basic preliminary steps, including, for any given Administration, all or nearly all of the following:

- At the outset, the names of judicial nominee candidates are identified (as recommended by Senators or others outside the Administration or as generated from within the Administration).
- The candidates fill out various forms and questionnaires, including a personal background information form for the FBI, a financial disclosure form, a White House questionnaire, and a questionnaire from the Senate Judiciary Committee. (Sometimes, the Administration waits until it has narrowed down the nominee search to one candidate, requiring only that candidate to fill out the aforementioned forms.)
- An initial evaluation (or "preliminary vetting") of the candidates is conducted, which includes interviewing some or all of the candidates (either by phone or in person) and reviewing publicly available information about them (such as their published writings and news media accounts of their past activities in public life).[113]
- The candidates also might, or might not, be asked by the Administration to fill out a questionnaire of an American Bar Association committee, which evaluates and rates the professional qualifications of nominees for federal judgeships.[114]

(...continued)

Goldman et al., "W. Bush Remaking the Judiciary," p. 287. The same scholars, after interviewing Bush Administration officials two years later, reiterated their earlier impression about the consultative role played by the White House: "If there is one domain in the selection process that remains an exclusive preserve of the White House Counsel's Office, as we found two years ago, that area involves consultation and negotiation with senators about specific nominees or potential nominees." Goldman et al., "W. Bush's Judiciary: The First Term Record," p 247.

[113] If FBI and other forms and questionnaires already have been filled out, these will be reviewed by Administration vetters for any points that might need to be raised or cleared up when a candidate is interviewed. Vetters also might make telephone contact with individuals named in the questionnaires (such as the chief judges of the federal district and appeals courts in which the candidates practiced law) to elicit their impressions of the candidates.

[114] From 1952, during the last months of the Truman presidency, to the end of the Clinton presidency in 2001, the ABA's Standing Committee on Federal Judiciary played a quasi-official advisory role to each Administration in the lower court selection process, confidentially evaluating the professional qualifications of candidates for lower court judgeships, prior to their nomination. During this process, each Administration informed the ABA committee of persons under final consideration for nomination to district or circuit court judgeships, with the President awaiting the committee's evaluations of the candidates before deciding whether to nominate. See Archived CRS Report 96-446, *The American Bar Association's Standing Committee on Federal Judiciary: A Historical Overview*, by Denis Steven Rutkus. (Copy available from author.) In 2001, however, President George W. Bush ended this process, excluding the ABA committee from any further role in the pre-nomination judicial selection process. Since then, the committee has performed an evaluation of judicial candidates only after their nominations have been made by the President. (continued...)

- The search is narrowed down to one candidate, who is recommended to the President for more intensive evaluation;
- The President clears the candidate for this more intensive evaluation, known as "detailed vetting."

The detailed vetting phase of the selection process, for any given Administration in recent decades, has included all, or nearly all, of the following steps:

- The FBI conducts a confidential background investigation of the candidate, which typically takes four to six weeks.
- The ABA Standing Committee on the Federal Judiciary, if informed by the Administration of the candidate under consideration (and upon receipt of an ABA questionnaire filled out by the candidate) also conducts an investigation of the candidate.[115]
- Simultaneously with the FBI investigation (and with the ABA committee investigation as well, if that committee is involved in the pre-nomination selection process), executive branch staff from the Department of Justice or the White House or both carefully review the candidate's written opinions or other legal writings (depending on whether the candidate is a judge or a practicing attorney), as well as the forms and questionnaires filled out by the candidate, and interview persons in the legal community who have had past contact with, or have knowledge about, the candidate.
- A follow-up interview of the candidate is conducted (either in person or by telephone) to address any new questions or confirm new information arising out of the detailed vetting process.
- Judicial selection staff in the Administration evaluate the results of the detailed vetting effort and recommend to the President whether to nominate the candidate.

In the Administration of President George W. Bush, the above steps in the selection process have been directed by a judicial selection committee consisting of staff from the White House counsel's office and the Department of Justice's Office of Legal Policy (OLP). Under the committee's direction, OLP staff have had primary responsibility for investigating the background and qualifications of prospective nominees. The sole responsibility for liaison with U.S. Senators, on the other hand, has resided with the White House counsel's office. Staff in this office receive input from Senators regarding judicial candidates and consult with Senators or their staff at different steps in the judicial candidate evaluation process. Consultation can be expected to include apprising Senators of the status of their recommended candidates and indicating how far along the Administration has progressed in narrowing its search for a nominee.

(...continued)

Evaluations are sent to the Senate Judiciary Committee, which typically awaits receipt of the ABA evaluations before it holds confirmation hearings on the nominations in question.

[115] However, as noted above, the ABA committee does not perform this role for the current Bush Administration (which, unlike previous recent administrations, does not inform the ABA committee of judicial candidates it is considering or seek the committee's evaluation of these candidates before making nomination decisions).

Clarifying the Senator's Role

Initial contacts between an administration and a Senator's office regarding judicial appointments can be expected to clarify the nature of the Senator's recommending role.[116] A principal question to be addressed in these contacts will be the degree to which the Administration, in its judicial candidate search, will rely on recommendations from the Senator. The Senator, for instance, will want to know whether the Administration will give sole or primary consideration to candidates that the Senator recommends for a particular judgeship—and, further, whether the Administration, if not comfortable with the Senator's candidates, will seek, and rely primarily on, additional recommendations from the Senator (rather than on recommendations coming from others). This role typically might be expected when the Senator is the only Senator in the state of the President's party, or if the state's other Senator is also of the President's party and the two are making joint recommendations, and if the vacancy to be filled is on a district court.

Under different circumstances, however, the Administration, might intend the Senator to have a lesser role. The Administration, for example, might welcome recommendations from the Senator, while also encouraging recommendations from other sources and while conducting its own search for candidates. This role might often be the case if the Senator is of the President's party but the appointment in question would be to a circuit court. In a third type of arrangement, it might be understood that the Senator would not be regarded as a primary source for candidate recommendations; however, as a courtesy, the Administration would consider any recommendations the Senator might make, apprise the Senator of judicial candidates under serious consideration, and invite the Senator's opinions about those candidates before one were selected as a nominee. This often might be the case when the Senator is of the opposition party, regardless of the kind of judgeship in question, and sometimes might be the case when the Senator is of the President's party and the appointment in question is to a circuit court.

Another question to be addressed in preliminary consultations between a Senator's office and the Administration will be the number of persons, if any, that the Senator is expected to recommend for a single judicial vacancy. In recent presidencies, the Administration practice usually has been to request that a Senator supply the names of at least three candidates for a judgeship, affording the President more options in making a final choice than would be possible with only one candidate under consideration. If multiple recommendations are requested by the Administration, a Senator might wish to establish whether this is a preference or a requirement. If a requirement, the Senator might wish to inquire into the Administration's possible willingness to initially evaluate only the Senator's first choice and, if finding that choice acceptable, to dispense with evaluating the other recommended candidates.[117]

[116] Subsequently, during a particular presidency, a Senator might consider it necessary to have additional contact with the Administration to confirm or further clarify the nature of the Senator's recommending role. This situation might arise, for example, if the Senator believes that the Administration is not fully conforming to earlier agreed-upon procedures regarding the Senator's role in the judicial selection process, if new Administration officials assume responsibility for judicial candidate selection or liaison with Senators on judicial selection matters, or if a new Member is elected to the state's other Senate seat.

[117] President Ronald Reagan's Administration appears to have been the first to institute a regular requirement that a home state Senator provide the names of at least three candidates for a vacant judgeship. This practice was continued by the Administration of George H.W. Bush, observed part of the time by the Clinton Administration, and re-instituted as a systematic practice by the Administration of George W. Bush.

Such Administration requirements, however, have not always prevented Senators from expressing strong preferences for one candidate or from securing for that candidate an "inside track" in the Administration's selection process. For (continued...)

Also a topic of possible discussion would be the Senator's relationship with the other state's Senator and the extent to which the two Senators would be coordinating or sharing the role as recommender. If one Senator would be taking the lead, to what extent would that Senator, or Administration officials, assume the responsibility for consulting with the other Senator regarding the search for, and evaluation of, judicial candidates? If an advisory panel were to be used, would it serve that Senator alone, or would the panel's recommendations, before being forwarded to the Administration, be cleared by the other Senator as well? If neither Senator were of the President's party, would designated officials in the President's party having a judicial recommendation role in that state be making recommendations to the Administration in close consultation with the Senators or apart from them?

The long-standing practice of presidential administrations ordinarily has been to give the primary recommending function to Senators of the President's party (or to House Members or state officials of the President's party when there are no Senators from the states of the vacancies) if the vacancy to be filled is that of a district judgeship. For circuit court nominations, by contrast, the Administration's usual practice (especially so with the most recent presidencies) has been to center its consideration on candidates whom it selected on its own, rather than on persons recommended by home state Senators.[118]

(...continued)

instance, during the Reagan presidency, an attorney working on judicial selections in the White House counsel's office noted that "some of our fiercest battles were with same-party Republican senators on district judges, where President Reagan sought to institute a very controversial rule. He insisted on receiving three names from Republican senators for district court nominees. We tried to enforce that rigorously. We had some senators who would say, 'If President Reagan wants three names, I'll give him three names, Smith, Smith, and Smith.' Ultimately, Judge Smith got appointed." Alan Charles Raul, associate counsel to President Ronald Reagan, quoted in, "Selecting Federal Judges; The Role and Responsibilities of the Executive Branch, *Judicature*, vol. 86, July-Aug. 2002, p. 20.

For district court appointments during the presidency of George H.W. Bush, a scholar noted, "the Justice Department asks Republican senators to submit three names for Department consideration. There has been some resistance on the part of some senators, but the Administration is not sympathetic to senators who submit one name and insist that person be named. However, the Justice Department will consider one candidate at a time provided that if the person proposed is not satisfactory to Justice, the senator will submit another name until a suitable candidate is found." Sheldon Goldman, "The Bush Imprint on the Judiciary: Carrying on a Tradition," *Judicature*, vol. 74, April-May 1991, p. 297.

During most of the Clinton presidency, the Justice Department "evaluated one person at a time for each district court vacancy ... although the proclivity was relaxed somewhat during the last two years in contentious settings where [Assistant Attorney General Eleanor D.] Acheson noted, 'we knew the whole thing was going to take a whole lot longer. We found ourselves on more than one occasion looking at two or three people simultaneously and making a decision about whom to go with.' With appeals court positions, it remained more common to evaluate multiple candidates for specific slots.... " Sheldon Goldman, Elliot Slotnick, et al., "Clinton's Judges; Summing Up the Legacy," *Judicature*, vol. 84, March-April 2001, p. 231. (Hereafter cited as Goldman, "Clinton's Judges.")

For the Administration of President George W. Bush, the standard practice has been to require that home state Senators recommending candidates for district judgeships provide "multiple names." Nov. 21, 2003, telephone interview with attorney Sheila Joy, Office of Legal Policy, Department of Justice.

[118] In this vein, political scientists in a 2005 article examining the lower court selection process of the Administration of President George W. Bush noted, "Historically, identification of potential district court nominees has largely been the role of home state presidential party senators, or in their absence, other prominent persons from the president's party. The White House's role in designating nominees has increased dramatically, particularly in recent administrations, at the court of appeals level." Goldman et al., "W. Bush's Judiciary: The First Term Record," p. 246. Similarly, in a 2001 article reviewing the lower court selection process of the Administration of President Bill Clinton, the same political scientists noted that the names of district court candidates "were typically directly submitted by Democratic senators, or when there were no Democratic senators from the states of the vacancies, by Democratic House members or Democratic state officials. Where appeals court vacancies were to be filled, names typically came from the White House Counsel's office." Goldman, "Clinton's Judges," pp. 229-230.

An administration, however, sometimes might be amenable to altering its usual practices. It might, for example, be amenable to allowing home state Senators not of the President's party, in some circumstances, a greater than usual role in recommending district court candidates, or to allowing home state Senators of either party a greater than usual role in identifying circuit court candidates for the Administration to consider. Further, even if afforded only a marginal role in recommending candidates at the outset, a home state Senator, regardless of party affiliation, ordinarily can expect to be consulted by the Administration subsequently during the selection process. The typical purpose of such consultation will be to apprise the Senator of candidates that the Administration is seriously considering and to afford the Senator an opportunity to express his or her views concerning the candidates.[119]

Accordingly, a home state Senator presumably will want to use his or her initial contact with the Administration, at the very least, to clarify the Administration's general policy regarding the recommending role of Senators in the selection of lower court nominees. In some cases, the Senator, during this initial or subsequent contact, might also wish to explore whether he or she can play a larger recommending role than ordinarily contemplated by Administration policy. Further, the Senator might want to clarify, when a home state judicial vacancy arises, how often and for what purpose the Administration would intend to consult with the Senator until a nominee were actually selected.

Consultation at Different Stages of the Process

Consultation between a Senator and the Administration over the selection of a judicial nominee can take different forms, depending on the stage reached in the selection process. Early in the process, as already noted, consultation may consist primarily of the Senator providing input to the Administration. The input in many cases will be in the nature of recommending a particular candidate or list of candidates for a judgeship. If providing more than one name, the Senator might or might not rank the candidates in order of the Senator's preferences. The input in some cases might also take a negative form, with the Senator expressing opposition to particular candidates or kinds of candidates. (A Senator might provide this kind of input if he or she understood that the Administration would be relying on its own internally generated list of candidates or on recommendations from sources other than the Senator.)

In some instances, a Senator may convey recommendations directly to the President—for example, in an in-person meeting, by telephone, or by letter—without White House or senatorial staff functioning as intermediaries. A Senator, or an aide on the Senator's behalf, also may submit recommendations to the President indirectly, by transmitting them, for example, in written or other form to the Administration office charged with serving as liaison to Senators on judicial appointment questions.

[119] The Administration of President George W. Bush has asserted on various occasions that it is very open to judicial candidate recommendations from Senators of both parties as well as to their views about other candidates under Administration consideration. At the conclusion of President Bush's first term, for instance, a White House counsel told scholars, "We always consult with home state senators, Democrats or Republicans, to find out if there are candidates that they would like for us to consider. We are also interested in receiving their feedback on candidates were are considering. The consultation has been extensive and consistently so." Dabney Friedrich, associate White House counsel, quoted in Goldman et al., "W. Bush's Judiciary: The First Term Record," p. 247.

As the selection process moves forward, the onus for engaging in further consultation shifts to the Administration, to apprise the home state Senator where things stand. The point at which this first occurs may vary somewhat, depending on the particular judicial position to be filled or on the understandings reached earlier between the Administration and the Senator. Often, however, renewed consultation can be said to come when the Administration is close to concluding, or has concluded, its preliminary evaluation of a candidate or candidates for a judgeships. Based in part on its interviews of the various candidates (if there is more than one candidate) and on a preliminary examination of the available record of the candidates, the Administration at some point will be in a position to apprise the home state Senator whether one candidate has emerged as the clear favorite.

Various policy statements made in recent decades by chairs of the Senate Judiciary Committee have expressed the view that home state Senators should be informed when an administration has narrowed its list of candidates for a judgeship to one candidate. The expectation of the policy statements has been that the home state Senators will be so apprised *before* the President approves that candidate for a more intensive "formal clearance"—before the candidate undergoes a complete FBI background investigation and other aspects of the "detailed vetting" process discussed earlier. If the Administration is considering the selection of someone other than a candidate recommended by the Senator, the Administration at this point may apprise the Senator of this fact, affording the Senator an opportunity to express any opinions or concerns about the candidate, including whether the Senator might oppose the candidate if nominated. In some instances, a preliminary review of candidates recommended by a Senator might result in the Administration deciding that none would be acceptable. At that point the Senator might be called on to provide additional recommendations for the Administration to consider (or, perhaps less often, be informed that Administration staff have decided on a candidate of their own to recommend to the President).

If a judicial candidate under consideration for "formal clearance" is a person recommended by the home state Senator, such clearance, when it occurs, of course, ordinarily will meet with the Senator's wholehearted approval. The subsequent "vetting" of the candidate, as already discussed, will involve a comprehensive FBI investigation of the candidate and might also include a review of the candidate's past rulings or legal writings, and the questionnaires he or she filled out, as well as an initial or follow-up interview of the candidate, and interviews of persons in the legal community who have had past contact with, or knowledge about, the candidate. During this investigation, Administration consultation with the home state Senator might entail little more than providing routine status reports on the progress of the clearance process, particularly if nothing problematic about the candidate is found.

By contrast, if a candidate under consideration for formal clearance has not been recommended by a home state Senator, subsequent Administration consultation with the Senator might, or might not, take place at several points. If it acts in keeping with the kind of consultative process called for in past policy statements of the Judiciary Committee, the Administration might notify the Senator that it is preparing to begin a formal clearance process for a particular candidate, affording the Senator an opportunity to provide feedback, before it actually initiates the clearance process. Subsequently, if the Senator, in providing feedback, objects to the candidate, the Administration, might in turn, as a courtesy (and in accord with past Judiciary Committee policy statements), notify the Senator that the formal clearance process is being initiated despite the Senator's objections.

If, at the conclusion of the clearance process, the President decides to nominate the candidate, consultation again can be expected, particularly if the home state Senators are of the President's party. Specifically, the Administration, if it acts in keeping with past Judiciary Committee statements, will notify home state Senators (whether or not they recommended the person involved) before the nomination is actually made. The Administration, however, is not obliged, by any rule or long-standing custom, to engage in all of the consultative steps just discussed. In the absence of any requirements to engage in pre-nomination consultation, a President's Administration might not always notify home state Senators of judicial candidates it is considering.

When a Nominee Is Selected against the Advice of, or Without Consulting, a Senator

Sometimes, as noted, a President might select a district or circuit court nominee against the advice of one or both home state Senators. On other occasions, the Administration might provide a home state Senator little or no opportunity to provide any feedback before a candidate is selected by the President as a judicial nominee. In either situation, the Senator will then face the question of whether to oppose the nomination, either first in the Senate Judiciary Committee or later on the Senate floor.

Option of Opposing the Nomination in Committee or on the Senate Floor

From the standpoint of a Senator, opposition to a lower court nomination in his or her state may serve a number of purposes, including the following:

- Preventing confirmation. The Senator's opposition, if successful, will prevent the nomination from receiving Senate confirmation. Opposition by the Senator will succeed if it causes the nomination to fail to be reported out of committee or to receive Senate consideration or a Senate vote to confirm.
- Averting a similar kind of nomination. Successful opposition to the President's nominee (preventing Senate confirmation) might dissuade the President from making a new nomination to the judgeship of someone else as objectionable to the Senator as the original nominee.
- Causing the Administration to take consultation more seriously. A Senator's opposition to a judicial nominee, based all or in part on an alleged lack of Administration consultation with the Senator, might persuade the Administration to consult more closely with the Senator when selecting future home state judicial nominees.
- Preserving the appointment for a later President or Congress. Successful opposition to the judicial nomination might, in some situations, delay the filling of the judgeship in question until a new President is in office or until a new Congress is convened (where, in either case, the Senator might have more influence over the selection of home state judicial appointments).

- Drawing attention to policy differences with the Administration. The inability of the Administration and the Senator to agree on a judicial nominee might suggest that they have different policy objectives for judicial appointments, or use different criteria in evaluating judicial candidates. In such situations, a Senator might wish to publicize, rather than conceal, these differences, to promote his or her own policy preferences and call those of the Administration into question.

If the Senator decides to oppose the nomination, the first available recourse will be to exercise the prerogatives afforded to a home state Senator by the blue slip policy of the Senate Judiciary Committee. As already discussed, the blue slip policy determines what effect the disapproval of a home state Senator (indicated by the return to the committee of a negative blue slip or by the non-return of the blue slip) will have on the prospects for a nomination to be considered by the committee. The blue slip policy is set by the chair of the Judiciary Committee, usually at the outset of a Congress. Over the years, particularly when the majority party in the Senate has changed (resulting in a new chair of the Judiciary Committee), or when an outgoing President has been succeeded by a President of the opposite party, the committee's blue slip policy also has changed—sometimes barely noticeably, but other times in more controversial ways.

The most important difference between various blue slip policies applied over the years, it can be argued, concerns whether, under a particular policy, a home state Senator may block committee consideration of a nomination simply by returning a negative blue slip (one expressing opposition to the nomination) or declining to return the blue slip. The blue slip policy of some committee chairs, including the one in effect during the 110th Congress, has been to afford that basic veto power to the home state Senator. When the committee's policy is to consider a nomination only if both home state Senators have returned positive blue slips, a refusal of one of the Senators to do so will block the nomination. The Senator, in such a situation, might initially have been unsuccessful in trying to prevent the President from nominating a particular person. Nevertheless, under the committee policy in effect in the 110th Congress, the Senator ultimately can succeed in preventing Senate confirmation of the nominee, by using the Judiciary Committee's blue slip procedure to stop the nomination in committee.

The policy of some other chairs of the committee, by contrast, has been not to allow a negative blue slip, or non-return of a blue slip, by itself to automatically block consideration of the nomination in committee. For instance, the policy sometimes has been applied to allow consideration of a judicial nomination when one or even (in very rare instances) both home state Senators have declined to return positive blue slips, or to allow a negative or unreturned blue slip to block committee consideration only if the Administration, in the view of the committee chair, did not consult in good faith with a home state Senator prior to selecting the nominee.[120]

When the Judiciary Committee's blue slip policy is not to allow a single home state Senator to block committee consideration of a lower court nominee, the next recourse available to the Senator is to convey to the committee his or her objections about the nominee, if and when it considers the nomination. The Senator might have objections based on concerns about the fitness of the nominee to be a federal judge, or about the nature or lack of consultation that the Administration engaged in with the Senator prior to the selection of the nominee. The Senator

[120] See, for example, table entitled "Senate Judiciary Committee Blue-Slip Policy by Committee Chairman (1956-2003)," in Archived CRS Report RL32012, *Animal Identification and Meat Traceability*, p. 26. See also, in same report, pp. 13, 22, which discuss two instances, one in 1985 and the other in 2003, in which the Judiciary Committee considered judicial nominations that had received negative blue slips from both home state Senators.

might wish to convey these concerns as an argument to the committee against voting on the nominee or, in the event of a vote, that the vote be to reject. Even if the Senator anticipates that the committee will vote to report the nomination, the Senator might wish to put his or her concerns about the nominee on record with the committee, to set the stage for making the same case again, before the full Senate.

Another tactical option for the Senator will be to try to persuade one or more members of the Judiciary Committee to engage in a filibuster in committee—in an effort to prevent the committee from voting on the nomination.[121] Rule IV of the Judiciary Committee's rules of procedure provides that debate on a matter before the committee shall be terminated if a non-debatable motion is made to bring the matter "to a vote without further debate," and it "passes with ten votes in the affirmative, one of which must be cast by the minority."[122] Depending on how the chair of the Judiciary Committee interprets Rule IV, a Senator opposing a nomination might, or might not, succeed in preventing a committee vote on it (and thus block it in committee). The Senator will succeed in a filibuster against the nominee, for instance, if none of the minority members of the Judiciary Committee votes in favor of a motion to terminate debate and if the chair of the committee interprets Rule IV as "providing the minority with a right not to have debate terminated and not to be forced to a vote without at least one member of the minority agreeing."[123] The Senator, however, will not succeed, if the chair wishes to bring the nomination to a vote and views the committee chair as having "the inherent power to bring a matter to a vote."[124]

If the Judiciary Committee votes to report the objected-to nomination, the home state Senator's opposition strategy then shifts to the Senate floor. At this point, the Senator, if so inclined, may inform his or her party leader that the Senator wants to place a "hold" on the nomination. This action would have the effect of preventing or delaying Senate action on the nomination, if the majority leader honors the request for a hold. Alternately, the Senator may request the leader to place a hold on another nomination or on an important Administration-backed bill, in order to pressure the President to withdraw the objected-to nomination. The effectiveness of the hold is grounded in the difficulty for the Senate, under its rules, of getting to a final vote on a nomination if a single Senator objects. Such an objection, voiced on behalf of the home state Senator, would indicate that a hold had been placed on the nomination[125] and that the Senator placing the hold might be prepared to filibuster the nomination.[126] To end delay on the nomination and allow for

[121] Of course, if a member of the Judiciary Committee, the Senator himself or herself may engage in this filibuster, either alone or (ideally, from the Senator's standpoint) with support from other members of the committee.

[122] U.S. Congress, Senate Committee on the Judiciary, *Rules of Procedure*, accessed Feb. 5, 2008, at http://www.judiciary.senate.gov/committee_rules.cfm.

[123] Sen. Patrick J. Leahy, "Nomination of Miguel A. Estrada, of Virginia, To Be United States Circuit Judge for the District of Columbia Circuit," remarks in the Senate, *Congressional Record*, vol. 149, March 13, 2003, p. 6185.

[124] Sen. Orrin G. Hatch, "Nomination of Miguel A. Estrada, of Virginia, To Be United States Circuit Judge for the District of Columbia Circuit," letter to Senate Democratic leader introduced into the *Record* during remarks in the Senate, *Congressional Record*, vol. 149, March 3, 2003, p. 4954.

[125] The Senator initially may place the hold with the party leader anonymously. However, if, in response to a motion, the party leader or the leader's designee objects explicitly on behalf of the Senator, the leader, under new Senate rules, would apparently identify the Senator. For an analysis of the process by which Senators use holds to block or delay Senate floor consideration of, or action on, a measure or matter, see CRS Report RL34255, *Senate Policy on "Holds": Action in the 110th Congress*, coordinated by Walter J. Oleszek.

[126] A filibuster-minded Senator would be one prepared to use extended debate and other delaying actions to prevent a vote from occurring.

an eventual vote on it may require three-fifths of the entire Senate membership, or 60 of 100, to vote in the affirmative under the cloture procedure of Senate Rule XXII.[127]

As long as the Senate majority leader honors the hold placed by the home state Senator, the nomination will not receive floor consideration.[128] (The Senator's hold will prevent confirmation if it succeeds in pressuring the President to withdraw the nomination or if it is honored by the majority leader until an adjournment of the Senate for more than 30 days, at which point, under Senate rules, the nomination may be returned to the President.) However, if the majority leader decides to schedule action on the nomination, the Senator must decide whether to filibuster it (as well as whether to enlist the support of other Senators in this effort). For their part, Senators supporting the nomination, in response to a filibuster (or in anticipation of one), may file a cloture petition (signed by 16 Members) to end debate. If three-fifths of the Senate's membership votes in favor of cloture, a maximum of 30 hours of additional debate on the nomination would remain. After 30 hours, unless less time were used, the Senate would vote on whether to confirm.

The success of a Senator's strategy to defeat the nomination by filibuster will be determined by the Senate's vote on any cloture motion that might be filed.[129] If fewer than three-fifths of the Senate's Members vote to invoke cloture, the Senator (and other Senators voting against cloture) will have succeeded in preventing a Senate vote on the nomination, at least at that time.

Option of Not Opposing the Nomination

Sometimes, a home state Senator might choose not to oppose a judicial nominee selected by the President with little apparent regard for the views of the Senator during the nominee selection process. Various considerations might influence the Senator to take this position.

One consideration for not opposing the nominee might be the desirability of filling the vacant judgeship in question as promptly as possible. To successfully oppose the nomination in the Judiciary Committee or the full Senate would compel the President to make a new nomination for the judgeship at a later point in time. The Senator's opposition, in other words, would prolong the time in which the judgeship was vacant. Hence, a Senator, in some situations, might consider filling the vacancy with a nominee in whom he or she found fault (or about whom the Senator had been inadequately consulted) to be a "lesser evil" than prolonging the vacancy indefinitely by successfully opposing the nominee in the Senate.

In some situations, another consideration for not opposing a nomination might be the nominee's qualifications for the judgeship—particularly if the nominee appeared highly qualified. This consideration, it could be argued, might be a reason for a Senator not to oppose the nominee

[127] For analysis of Senate procedure and rules that govern efforts by Senators to end floor debate on nominations, see CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer (under heading "Filibuster"); and CRS Report RL32843, *"Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications*, by Richard S. Beth.

[128] "It is up to the majority leader to decide whether, or for how long, he will honor a colleague's hold. Scheduling the business of the Senate is the fundamental prerogative of the majority leader, and it is done in consultation with the minority leader." CRS Report 98-712, *"Holds" in the Senate*, coordinated by Walter J. Oleszek.

[129] If an initial cloture motion is not agreed to, supporters of the nomination are not precluded from filing additional cloture motions to limit debate and force a vote on the nomination.

unless the Senator thought his or her own candidate search would likely produce an even more qualified nominee.

A Senator also might not wish to oppose a particular nomination if it might project to the public a picture of the Senator as "obstructionist" or unduly antagonistic in relation to the Administration. Particularly, under certain circumstances, opposing a President's judicial nomination might be seen as unduly negative. For instance, if the Senator's objections to the nominee are purely procedural in nature (in essence, that the Administration afforded the Senator little or no opportunity to provide input prior to the candidate's being nominated), the Senator might see the merits of opposing the nominee on these grounds as outweighed if the Senator finds no fault with the nominee and if the public is also likely to look favorably or sympathetically upon the nominee.

Sometimes a consideration not to oppose a home state judicial nomination might be the likelihood of more judicial vacancies arising in the Senator's state in the near future. A Senator might see these future vacancies as providing a better opportunity for exerting senatorial influence over judicial appointments than is possible by opposing someone whom the President has already nominated. Further, by not opposing a particular home state nomination, the Senator might be in a position to gain goodwill with the Administration, from which the latter might well be moved to afford the Senator a more enhanced role in the selection process for future home state judicial nominees.

A final consideration for not actively opposing a judicial nominee is that this option would not necessarily preclude the Senator from expressing criticisms of the current nominee or of the process used in his or her selection. While refraining from opposing the nominee, the Senator would be free to call on the Administration to "do better" with its next judicial nomination from the Senator's state. The Senator also could suggest ways of improving the consultative process between the Senator and the Administration in the search for future lower court nominees, as well as the kind of qualities that the Senator deemed important for the future nominees to possess. This approach, it could be argued, would put the Administration on notice that public criticism of, and possible opposition to, the next judicial nominee from that state could be expected, if more attention were not paid in the future to the Senator's views during the nominee selection process.

Current Issues and Concluding Observations

Wide Acceptance of Importance of Pre-Nomination Consultation

Home state Senators have long played an important role in providing advice to Presidents on judicial appointments. Historically Presidents have generally been more receptive to such advice when it has come from Senators of their own party rather than of the opposition party. Nevertheless, presidential administrations have long recognized that pre-nomination consultation with opposition party home state Senators also is important, serving, at the very least, as a means to learn Senators' views about potential nominees (and whether they would be likely to return positive blue slips to the Judiciary Committee if certain candidates were nominated).

In recent decades, despite periodic controversies over judicial nominations, the idea that there should be consultation on judicial appointments between an administration and home state Senators, regardless of their party, appears to have gained widespread acceptance. As discussed

earlier, various chairs and other members of the Judiciary Committee, in correspondence with the White House between 1989 and 2001, declared the importance of such consultation.[130] Specifically, these letters expressed the expectation that the Administration engage in consultation with home state Senators of both parties that is "in good faith," "serious," and two-way. Senators, the letters said, should not only provide feedback on judicial candidates under Administration consideration but also have the opportunity to make their own candidate recommendations. The letters also called for consultation to include a number of specified sequential steps, to keep Senators informed and involved throughout the Administration's judicial selection process. Recent administrations have not publicly challenged these expectations; indeed, the White House counsel to President George W. Bush, in a 2001 letter, indicated his general acceptance of them.[131]

Recent Controversies over Administrations' Consultation with Senators

During the nation's two most recent presidencies, however, Senators, usually of the opposition party, have sometimes questioned the adequacy of Administration consultation with home state Senators in the lower court selection process. In 1997, for instance, during the presidency of William J. Clinton, Senator Orrin G. Hatch (R-UT), then-chairman of the Judiciary Committee, drew attention to questions that he said had been raised about the Clinton Administration's "level of consultation" with home state Senators on lower court appointments:

> While we are on the subject of judicial nominations, I would like to respond to some of my colleagues who have come to me to express their frustration that they have not received the level of consultation that they have expected, and typically received, regarding nominees from their states. It has long been the policy of the Senate, and of the Committee, that a fair, efficient and cooperative confirmation process is best achieved when the Executive Branch engages in genuine, good faith consultation with home state senators in the process of determining whom to nominate for judicial positions.[132]

Several years later, Senator Hatch, who had been chairman of the Judiciary Committee during the last six years of the Clinton Administration, explained what had happened to some of the judges nominated by President Clinton who were not confirmed. "Seventeen of those," Senator Hatch said, "lacked home state support, which often resulted from the White House's failure to consult with home state senators. There was no way to confirm those nominations without completely ignoring the senatorial courtesy we afford to home state Senators in the nomination process."[133]

[130] See more detailed discussion of these letters in above report section on "Blue Slip Policy of Senate Judiciary Committee."

[131] Alberto R. Gonzales, counsel to the President, to Sen. Patrick J. Leahy and other Democratic members of Senate Judiciary Committee, May 2, 2001. (Copy available from author.) Gonzales wrote to the Democratic Senators that "we generally agree with your specific suggestions for keeping home state Senators informed and seeking their advice." He added that in "all cases, you may be certain that we will work hard to ensure that home state Senators will have a suitable opportunity to express their views concerning possible nominees well in advance of nomination."

[132] Sen. Orrin G. Hatch, "Statement of Sen. Orrin Hatch," news release, April 17, 1997. (Copy available from author.)

[133] Sen. Orrin G. Hatch, "Nomination of Miguel A. Estrada, of Virginia, To Be United States Circuit Judge for the District of Columbia Circuit," *Congressional Record*, vol. 149, March 3, 2003, p. 4933.

During the current presidency of George W. Bush, Senators, mostly along party lines, have periodically debated whether the Administration has adequately consulted with home state Senators before President Bush selected his nominees. Democratic leaders in the Senate have asserted that the Bush Administration frequently has not consulted with, or heeded the advice of, their party's home state Senators before the President made judicial nominations. As a result of not receiving senatorial input, or receiving but not heeding it, the President, they maintained, has made unwise, controversial nominations, provoking Democratic opposition in the Senate.[134] Senate Republicans, by contrast, have defended the Bush Administration, portraying it as having regularly consulted with Senators regarding judicial nominations in their states, while faulting opposition party Senators for seeking, through the consultative process, the power to select whom the President nominates, rather than solely making recommendations or expressing opinions about candidates under presidential consideration.[135]

During two Congresses coinciding with the Bush presidency (the 108th and the 109th) Congresses), the President's party, the Republicans, had majority control of the Senate. During the 108th Congress, the blue slip policy of the Senate Judiciary Committee then in effect did not prevent committee consideration of, or action on, five circuit court nominations that were ultimately reported to the Senate in spite of opposition by Democratic home state Senators.[136] In the Senate, however, in the face of significant opposition from Democratic Members, none of the five nominees received final confirmation votes[137] (although three were subsequently confirmed,

[134] In this vein, the ranking Democratic member on the Senate Judiciary Committee, at a June 17, 2004, executive business meeting of the committee, noted that a controversial nominee to the U.S. Court of Appeals for the Sixth Circuit about to be voted on by the committee was opposed by Michigan's two Democratic Senators (who each returned a negative blue slip to the committee). Both of these Senators had "attempted to work with the White House to offer their advice, but their input was rejected." Statement of Sen. Patrick J. Leahy, "Senate Judiciary Committee, Executive Business Meeting, The Saad Nomination," June 17, 2004. (Copy available from author.) Similarly, in a 2005 letter to the Senate Republican majority leader, the Senate Democratic leader maintained that "[o]ver the last four years President Bush too often failed to seek the advice of the Senate before making unwise nominations, and Democrats lacked any means short of a filibuster to carry out our duty under the Advise and Consent Clause of the Constitution." Sen. Harry Reid, Senate Democratic leader, letter to Sen. William Frist, Senate majority leader, May 10, 2005. (Copy available from author.)

[135] See, for instance, the remarks of Sen. Orrin G. Hatch (R-UT), then-chair of the Judiciary Committee, during Senate floor debate in 2003 on a circuit court nomination opposed by the majority of Senate Democrats, during which Sen. Hatch said: "I think some of our colleagues on the other side want to choose these judges, and we are finding that continuously in their arguments, that the administration does not 'consult' with them. If consultation means the administration has to take whatever judges the Democrats desire, that is not consultation. Consultation is letting them know what is on the mind of the President, and the administration discussing it with them, seeing if they have any real objections to the choices of the President, asking them to weigh in and give the administration whatever information they can, and then making the choice and going from there. That is consultation." Sen. Orrin G. Hatch, "Nomination of Miguel A. Estrada, of Virginia, To Be United States Circuit Judge, for the District of Columbia Circuit," *Congressional Record*, vol. 149, Feb. 12, 2003, p. 3544.

[136] Available on the website of the U.S. Department of Justice's Office of Legal Policy are lists showing, for each circuit and district court nomination in the 107th and 108th Congress, whether the home state Senators returned a blue slip and whether the blue slip was "positive" or "negative." (Comparable blue slip information is not available on the website for the 109th and 110th Congresses.) See http://www.usdoj.gov/olp/blueslips/htm, accessed on Feb. 5, 2008. During the 108th Congress, the website shows, that "negative" blue slips were returned to the Judiciary Committee for the circuit court nominations of Richard A. Griffin, David W. McKeague, Susan B. Neilson, and Henry S. Saad (all of Michigan) and that one home state Senator declined to return a blue slip for the circuit court nomination of Carolyn B. Kuhl of California (with the other Senator having "reserved judgement"). Notwithstanding the absence of positive blue slips from their home state Senators, the five nominations all were considered and reported by the Senate Judiciary Committee. See Appendix 3 in CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

[137] In the case of four of the nominations, motions were made by Senate Republicans to close debate, but these motions (continued...)

during the 109th Congress).[138] Also during the 108th Congress, long-running consultations between the White House and one state's Democratic Senators failed to reach an agreement over whom from that state to nominate for circuit judgeships. The President was criticized by Senate Democrats,[139] but defended by Senate Republicans,[140] for not agreeing to a proposal offered by the two home state Senators as a compromise. Under their proposal, a bipartisan judicial nomination commission would be established, with the President selecting circuit court nominees from names recommended by the commission.

During the 109th Congress, with Republicans again in the Senate majority (but with the Judiciary Committee under a different chair), no instances were reported of district or circuit nominations receiving committee action in the absence of favorable blue slips returned to the committee by home state Senators. Senate Republicans and Democrats, however, clashed over other judicial nominations and over the propriety of using filibusters on the Senate floor to prevent Senate votes on those nominations.[141] In May 2005, leaders of the Senate's Republican majority announced their intention, if Senate Democrats continued to seek to prevent confirmation votes on several circuit court nominees, to change the chamber's rules or precedents to require the vote of only a simple Senate majority to end Senate debate on judicial nominations.[142]

A Senate confrontation over judicial filibusters was averted on May 23, 2005, when an agreement was reached by a coalition of seven Democratic and seven Republican Senators. As part of the agreement, the Senators in the coalition pledged not to lend their support to filibusters against judicial nominations except under "extraordinary circumstances," and not to support any change in the Senate rules to bar filibusters against judicial nominations, as long as the "spirit and continuing commitments made in this agreement" were kept by all of the Senators in the coalition.[143] As a result of this agreement, some, but not all, of the President's most controversial

(...continued)

proved unsuccessful. The Senate (as discussed above) can close debate by passing a cloture motion, which requires a super-majority of three-fifths of the Senate, or 60 Members, voting in favor. During the 108th Congress, there were 10 circuit nominations on which the Senate, on one or more occasions, voted not to close debate, including the nominations of Carolyn B. Kuhl, Richard A. Griffin, David W. McKeague, and Henry S. Saad. The number of votes cast to close debate on these four nominations, in each case, fell short of 60. No floor vote of any kind, procedural or on whether to confirm, was cast by the Senate during the 108th Congress on the fifth nomination cited in the previous footnote, Susan B. Neilson. See Appendix 3 in CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*.

[138] Of the five aforementioned nominees, the three who received Senate confirmation in the 109th Congress were Richard A. Griffin, David W. McKeague, and Susan B. Neilson. See Appendix 1 in CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses.*

[139] See, for example, Sen. Debbie Stabenow, "Judicial Nominees," *Congressional Record*, vol. 149, July 16, 2003, p. 18212.

[140] See, for example, Sen. Bill Frist, "Stalled Nominations for the Sixth Circuit," *Congressional Record*, vol. 149, July 16, 2003, pp. 18207-18211.

[141] See, for example, Carl Hulse, "Filibuster Fight Nears Showdown," *The New York Times*, May 8, 2005, pp. 1,19; Charles Babington, "Clash Over Judicial Filibusters Nears Boiling Point," *The Washington Post*, May 9, 2005, p. A21; and Bill Sammon and Charles Hurt, "Bush Raps Judicial Filibuster," *The Washington Times*, May 10, 2005, p. A12.

[142] Senate Republican leaders announced that their move to change Senate precedents to bar filibusters against judicial nominations would occur in conjunction with their efforts to close floor debate on the nomination of Priscilla Owen to be a U.S. circuit court of appeals judge. (An earlier nomination of Owen to the same judgeship, during the 108th Congress, had been successfully filibustered four times by Senate Democrats.) Keith Perine and Daphne Retter, "Judicial Showdown Starts with Owen," *CQ Today*, vol. 41, May 18, 2005, pp. 1,32.

[143] Charles Babington and Shailagh Murray, "A Last-Minute Deal on Judicial Nominations," *The Washington Post*, May 24, 2005, pp. A1, A4. See also CRS Report RS22208, *The "Memorandum of Understanding": A Senate*
(continued...)

circuit court nominations, which previously had been blocked on the Senate floor, were confirmed.[144]

The agreement, in the form of a "memorandum of understanding," also called on the President to consult with Senators, regardless of their party, on prospective judicial candidates. Specifically, on this point, the memorandum stated:

> We believe that, under Article II, Section 2, of the United States Constitution, the word "Advice" speaks to consultation between the Senate and the President with regard to the use of the President's power to make nominations. We encourage the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination for consideration.
>
> Such a return to the early practices of our government may well serve to reduce the rancor that unfortunately accompanies the advice and consent process of the Senate.[145]

Throughout most of the first Congress coinciding with his presidency (the 107th), President Bush's party was not the majority party in the Senate, and it is not the majority party in the 110th Congress. In the Judiciary Committee during the 107th Congress, five lower court nominees opposed by home state Senators were among a larger number whose nominations did not advance to the committee hearing stage.[146] Likewise, under the blue slip policy in effect in the 110th Congress, the Judiciary Committee will not consider or act on a judicial nomination if a home state Senator declines to return a positive blue slip.[147] Further, the chairman of the Judiciary

(...continued)

Compromise on Judicial Filibusters, by Walter J. Oleszek; and CRS Report RL33094, *Congress and the Courts: Current Policy Issues*, by Walter J. Oleszek (under headings "The Bipartisan Agreement: A Memorandum of Understanding" and "Diverse Definitions of 'Extraordinary Circumstances'").

[144] Other controversial nominees received no further Senate action during the rest of the 109th Congress, and four of them were not re-nominated in the 110th Congress. See David G. Savage and Henry Weinstein, "4 White Flags Fly in Courts Fight; With the Senate in the Hands of Democrats, the Most Controversial of Bush's Judicial Nominees Are Withdrawn," *Los Angeles Times*, Jan. 10, 2007, p. A12.

[145] Seth Stern, "Deconstructing the Senate's Bipartisan Deal on Judicial Nominations," *CQ Today*, vol. 41, May 25, 2005, p. 31. The full text of the memorandum of understanding can be found in the *Congressional Record*, daily edition, vol. 151, May 24, 2005, pp. S5830-S5831.

[146] Blue slip information for the 107th Congress posted on the U.S. Department of Justice website has listed five circuit court nominations and one district court nomination for which one or both home state Senators returned a negative blue slip or declined to return a positive blue slip. These specifically were the circuit court nominations of Terrence W. Boyle of North Carolina, Carolyn B. Kuhl of California, and David W. McKeague, Susan B. Neilson, and Henry W. Saad, all of Michigan, and the district court nomination of James C. Dever III of North Carolina. See http://www.usdoj.gov/olp/blueslips/htm, accessed Feb. 5, 2008. In the absence of positive blue slips from both home state Senators, none of these five nominations was considered by the Judiciary Committee during the 107th Congress. See Appendices 2 and 4 in CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*. The five were among 12 circuit court nominees and 15 district court nominees failing to be confirmed who did not receive a hearing during the Congress, while 17 other circuit court and 83 other district court nominees during the Congress did receive Senate confirmation. See Ibid., under the headings "President Bush's Circuit Court Nominations During Particular Congresses," and "President Bush's District Court Nominations During Particular Congresses." For analysis of the kind of opposition that President George W. Bush's lower court nominations encountered in the Senate during the 107th Congress, including use of the Judiciary Committee's blue slip procedure to prevent nominations from receiving committee consideration, see Jonathan Groner, "A Major Shift in the Battle for the Bench," *Legal Times*, vol. 25, Nov. 11, 2005, p. 8.

[147] See "Senators Can Veto Judicial Picks," *Grand Rapids Press*, Jan. 5, 2007, p. B6, reporting that "U.S. Sen. Patrick Leahy, D-Vt., who chairs the Senate Judiciary Committee, said this week both senators from a state, regardless of party affiliation, will have to concur with a nomination before his committee will consider it." See also Keith Perine, "As (continued...)

Committee, on various occasions, has criticized President Bush for failing to "work with" Senators of several specified states in making judicial nominee selections for those states[148] and for selecting nominees who have not received support from their home state Senators in the form of positive blue slips.[149]

In another instance during the 110th Congress, the President has nominated someone to a circuit judgeship who was not on the list of five candidates recommended jointly to the judgeship by the two home state Senators, one a Republican and the other a Democrat. (The nominee, however, had been on the list of candidates recommended by the Republican Senator earlier, in the 109th Congress.) Immediately, upon announcement of the nomination, the two Senators criticized the White House for ignoring their recommendations,[150] with the Democratic Senator reportedly stating there was "no way" he would return a positive blue slip to the committee needed for Judiciary Committee consideration of the nomination.[151] Eventually, the nominee, citing "press reports" that he was unlikely to receive a hearing before the Judiciary Committee, requested that President Bush withdraw his nomination.[152]

(...continued)

Judicial Battles Loom, Leahy Revives Senate 'Blue Slip' Tradition," *CQ Today*, Jan. 3, 2007, accessed Feb. 5, 2008, at http://www.cq.com.

[148] See, for instance, the opening statements of Sen. Patrick J. Leahy, chairman of the Senate Judiciary Committee, at committee hearings held on judicial nominations on July 19, 2007, at http://www.leahy.senate.gov/press/200707/071907c.html and on Dec. 18, 2007, at http://www.leahy.senate.gov/press/200712/121907f.html, both accessed Feb. 5, 2008, as well as the Senate floor statement of Sen. Leahy on March 3, 2008, at "Judicial Nominations," *Congressional Record*, daily edition, vol. 154, March 3, 2008, pp. S1460-S1462.

[149] On March 3, 2008, in a Senate floor statement, the chairman of the Judiciary Committee noted that of "the 11 circuit nominations that have been pending before the Senate this year, 8 have not had the support of home State Senators." Sen. Patrick J. Leahy, "Judicial Nominations," *Congressional Record*, daily edition, vol. 154, March 3, 2008, p. S1461. See also Keith Perine, "No Easing of Bush's Stance on Judicial Nominations," *CQ Weekly*, vol. 65, Nov. 5, 2007, pp. 3315-3316. (Hereafter cited as Perine, "No Easing of Bush's Stance.")

[150] Sen. John Warner (R-VA) was quoted as having told the White House that "I steadfastly remain committed to the recommendations stated in my joint letter with Senator Webb." Jerry Markon, "Bush's Picks for Court Spur Criticism by Warner, Webb," *The Washington Post*, Sept. 7, 2007, p. B5. Sen. Jim Webb (D-VA) declared that "despite our good faith, bipartisan effort to accommodate the President, the recommendations that Senator Warner and I made have been ignored. The White House talks about the spirit of bipartisanship, lamenting congressional obstructionism. The White House cannot expect to complain about the confirmation of federal judges when they proceed to act in this manner." Sen. Jim Webb, "Webb Responds to White House's Nomination of Duncan Getchell," news release, Sept. 6, 2007, accessed Feb. 5, 2008, at http://www.webb.senate.gov.

[151] Peter Hardin, "Webb Has Pair of Fights on his Hands; He May Block Judge Pick and Will Push Again for More Time Off for Troops,"*Richmond Times Dispatch*, Sept. 13, 2007, p. B2.

[152] Manu Raju, "Judicial Nominee Withdraws amid Democratic Criticism," *TheHill.com*, Jan. 18, 2008, accessed Jan. 24, 2008, at http://www.thehill.com. The nominee, Duncan Getchell of Virginia, had been nominated by President Bush to a judgeship on the U.S. Court of Appeals for the Fourth Circuit. In a letter sent to the White House, Getchell said that "recent press reports indicate ... that the Senate Democratic leadership will not allow a hearing [on the nomination] to go forward.... " Ibid.

During the 110th Congress, opposition by home state Senators also has blocked at least two U.S. district court nominations from being considered by the Senate Judiciary Committee (in one case influencing President George W. Bush to withdraw the nomination). See Jay Jochnowitz, "Donohue Won't Get Federal Judgeship; Ex-Lieutenant Governor's Quest formally Ended by White House Action," *The Times Union* [Albany, NY], Sept. 7, 2007, p. A3 (reporting on President Bush's withdrawal, on Sept. 6, 2007, of the nomination of Mary O. Donohue to the U.S. District Court for the Northern District of New York); Erica Werner, "Boxer Blocking Former Rep. Rogan Nomination to Federal Judiciary," *Associated Press*, Nov. 30, 2007, accessed on Feb. 5, 2008, at http://www.lexisnexis.com (regarding nomination of former Rep. James E. Rogan to the U.S. District Court for the Central District of California); David G. Savage, "Rogan May Be Denied Seat on Federal Bench," *Los Angeles Times*, Dec. 4, 2007, p. A14.

Specific Issues Concerning the Recommending Role of Home State Senators

In recent years, the role to be played by home state Senators in the selection process for lower court judges has periodically been the subject of debate. Specific issues concerning the Senators' recommending role have included the following:

What Constitutes "Good Faith" or "Serious" Consultation?

Various Judiciary Committee policy statements, discussed earlier, have prescribed specific consultative steps between an administration and home state Senators as requisite elements in consultation conducted seriously and in good faith. The statements, however, did not address how seriously the Administration should consider the Senators' judicial candidate recommendations or their objections to other candidates under Administration consideration. In various controversies over particular judicial nominations during the Bush presidency, Democratic home state Senators asserted that the Bush Administration did not engage in good faith, serious consultation with them during the judicial nominee selection process, an assertion denied by the Administration. The Administration view, in these controversies, appeared to be that it engaged in good faith, serious consultation with a home state Senator on judicial nominations if it considered the input of a Senator, even if it ultimately made a decision (in the selection of a judicial nominee) contrary to the Senator's express wishes. On the other side, by contrast, the view of opposition party Senators appeared to be that good faith, serious consultation was shown not to have occurred when the President selected a judicial nominee over their strong objections or with evident disinterest in candidates that they might have proposed.

Should Home State Senators Always Have the Opportunity to Provide Their Opinion of a Judicial Candidate Before He or She Is Nominated?

Over the years, the Bush Administration's stated practice has been one of welcoming home state Senators' views about who should or should not be nominated to fill federal court judgeships in their states.[153] The Administration, however, appears not always to have informed home state Senators, prior to announcing the selection of a nominee, of all candidates under consideration or of the candidate finally chosen to be the nominee. For example, in at least one such instance, a circuit court nominee allegedly was selected without prior consultation with the home state Senators. A spokesperson for one of the Senators criticized the President for acting in an "uncooperative unilateral manner," which, he said, broke "sharply from the cooperative process in which previous nominees were chosen.[154]

[153] See, for example, in Goldman et al., "W. Bush Remaking the Judiciary," p. 287, quoting Brett Kavanaugh, associate White House counsel, early in the Bush presidency, as follows: "We consult with the home state senators on both district court and courts of appeals and run by them, before an FBI background check, names of people who are under consideration to get their reaction ahead of time, and that helps avoid problems down the road. We maintain consultation logs, and I think there's been extensive consultation." See also the previously cited remarks, later in the Bush presidency, of White House counsel Dabney Friedrich, quoted in Goldman et al, "W. Bush's Judiciary: The First Term Record," p. 247.

[154] Elana Schor and Manu Raju, "Dems Grapple with Appeals Nominee, High Court's Future," *The Hill*, vol. 14, July 19, 2007, p. 4. The nomination in question was that of Shalom Stone of New Jersey to the U.S. Court of Appeals for the Third Circuit, which another news account reported "was made without input from the state's [New Jersey's] two (continued...)

How Differently Should the Administration Treat the Input of Senators, Depending on Their Party Affiliation?

Historically, as a general rule, Presidents, as already discussed, have been much more accepting of judicial recommendations from Senators of their own party than from Senators of the opposition party. When neither of a state's Senators are of the President's party, the recommending role has traditionally been filled by another state official of the same party as the President, such as the governor or the most senior U.S. Representative of the President's party from the state. If only one of the state's Senators is of the President's party, the role of providing recommendations traditionally has belonged to that Senator alone, to the exclusion of any significant consultative role for the opposition party Senator.

Like many of his White House predecessors, however, President George W. Bush has selected some lower court nominees from among candidates recommended by opposition party Senators. In these situations, the Administration might make special accommodations with opposition party Senators for reasons unique to the state in question—for example, to be in keeping with an established practice in the state for its two Senators, regardless of their party, to make recommendations to the President; to minimize potential conflict with particular Senators whose support for, or opposition to, the President's judicial nominations, might be regarded as of strategic importance for confirmation purposes; or to minimize the chances of opposition party Senators using the Senate Judiciary Committee's blue slip procedure to block home state nominations in committee.

In the 110th Congress, with the Democrats in the Senate majority, and thus able, if voting along party lines, to defeat a judicial nominee in committee or on the Senate floor, an issue for the Administration is whether to accord a primary recommending role to opposition party Senators in additional states. Many opposition party Senators presumably would welcome such a role. Nonetheless, there would appear to be powerful political and policy incentives for a President not to confer this role on opposition party Senators in general. In states without a Senator of the President's party, other officials of the President's party, based on tradition, can claim a role in the judicial selection process, and they might well be offended if required to share this role with (or relinquish it to) opposition party Senators. Further, the President presumably would wish, as much as possible, to draw upon judicial nominee recommendations from persons who are sympathetic to his philosophical views about the judiciary; this concern would be an incentive for him to rely as much as possible on input from officials of his own party, rather than on opposition party Senators.

What Prerogatives Should Home State Senators Have in the Selection of Circuit Court Nominees?

As already discussed,[155] home state Senators of the President's party by custom exert less influence over the selection of circuit court nominees than of district court nominees. Such

(...continued)

Democratic Senators. Lisa Brennan, "N.J. Republican Lawyer Nominated to Fill Alito Seat on 3rd Circuit," *New Jersey Law Journal*, July 19, 2007, accessed Feb. 5, 2008, at http://www.law.com.

[155] See earlier section of this report under the heading "Lesser Role for Senators When Recommending Circuit Court Candidates."

Senators may, and frequently do, recommend circuit court candidates, but with the usual understanding that the Administration will be considering other candidates as well—with the distinct possibility of the President selecting a nominee from the latter group. Home state Senators of the opposition party are also free to recommend candidates for circuit court nominations (as they may for district court nominations). By custom, however, such recommendations (in large part because they come from the Senators of the opposition party) are ordinarily not at the top of the list among candidates under Administration consideration. (The rare exceptions to this, where recommendations by an opposition party Senator are a major consideration in the selection of circuit court nominees, have usually occurred when the recommendations were made jointly with a Senator of the President's party or in accord with the recommendations of a bipartisan judicial nominee selection panel established in the Senators' state.)

Throughout the presidency of George W. Bush, Administration sources have indicated an openness to receiving circuit nominee recommendations from home state Senators, without, however, being under any obligation to follow the advice given. President Bush's disinclination to cede selection power to home state Senators of his party in the area of circuit court appointments seemed to be borne out by various news media accounts in 2007, which reported on public disagreements between the Bush Administration and a number of Republican Senators over whom to nominate to fill certain circuit judgeships. A *Washington Post* story, reporting on these disagreements, quoted "one conservative who is close to the nominating process" (and who would speak only on the condition of anonymity) as saying, "There has been a long-standing practice in Republican administrations that courts of appeals nominees are the president's prerogative, period."[156]

Controversy also has arisen periodically, throughout the Bush presidency, over how much influence home state Senators of the opposition party should have on the President's selection of circuit court nominees. The controversies usually have occurred when President Bush selected nominees who were objectionable to the Senators, doing so apparently uninfluenced by the Senators' pre-selection input aimed at dissuading him from making these choices. Rather than "working with" the home state Senators to select nominees who would be acceptable to both sides, the President, his Senate critics have alleged, selected nominees without regard to the Senators' nominee preferences or concerns.

The Bush Administration, as of early March 2008, has not publicly stated, as a matter of general policy, what it regards as the proper degree of influence for opposition party home state Senators to have on the selection of circuit court nominees, or to what degree the President should accommodate opposition party Senators in these selections. However, if it chose to do so, the Administration arguably could defend decisions by the President to make circuit nominee selections against the advice of opposition party Senators on at least these two grounds: First, it could be argued, if the President typically does not give primary consideration to the circuit court recommendations from home state Senators of his own party, why should he do so for home state Senators of the other party? Second, it arguably is appropriate, given the importance of the rulings of the circuit courts (in setting precedents that are binding on all the district courts within their circuits), that a President be concerned with selecting circuit court nominees who have a

[156] The article also reported that "[s]ome conservatives privately say that the Republican senators are overstepping their responsibility, which traditionally gives them a much larger role in district courts than in the appellate courts." Robert Barnes and Michael Abramowitz, "Conservatives Worry about Court Vacancies," *The Washington Post*, June 10, 2007, p. A4.

judicial philosophy that is compatible with his own. From the President's standpoint, opposition party Senators, who have frequently been in public conflict with his Administration over the criteria to use in selecting judicial nominees, cannot realistically be regarded as providing the most suitable circuit candidate recommendations for the President to consider.

In the 110th Congress, however, a new consideration for the President has come into play, one favoring a more important role for opposition party Senators in the circuit nominee selection process than they traditionally have been afforded. This consideration is that a circuit or district court nomination has a reduced chance of being confirmed by the Senate during the 110th Congress if it is opposed by a home state Senator, which was not necessarily the case in previous Congresses.

After being the minority in the Senate during the 108th and 109th Congresses, the Democrats in the 110th Congress now have majority control of the Senate and its Judiciary Committee. As already discussed, under the blue slip policy of the Judiciary Committee now in effect, a circuit or district court nomination in a state will not be considered by the committee if both of the state's two Senators have not returned positive blue slips. For the Bush Administration, the consequences of this policy appear to be as follows: If the President selects a circuit (or district) court nominee over the objections of a home state Senator of the opposition party, or in spite of the Senator's recommendations that someone else be nominated, the Senator, by declining to return a positive blue slip, can block the nomination in the Judiciary Committee. Where an opposition party Senator is able and inclined to block a home state judicial nomination unless the President selects a nominee acceptable to the Senator, the Administration may have to make some accommodation with the Senator—if it hopes to see the nomination confirmed. The accommodation would consist, in some way, of affording the Senator a greater, more influential role in the nominee selection process than typically has been afforded opposition party Senators in the past.

Should the Policy of the Judiciary Committee Allow a Home State Senator to Block Committee Consideration of a Judicial Nominee?

In recent decades, the blue slip policy of the Senate Judiciary Committee, as already discussed, has often varied, depending on the committee chair. The blue slip policy of the Judiciary Committee under its current chair is that a judicial nomination will not receive a hearing unless both home state Senators return a favorable blue slip to the committee.[157] Several home state Senators in the 110th Congress have indicated their displeasure with the Administration for not having consulted with them more actively in a cooperative effort to select circuit court nominees from their states.[158] Decisions by any of these Senators not to return positive blue slips for judicial nominees from their states, it has been noted, would prevent Judiciary Committee consideration

[157] At the start of the 110th Congress, an aide to Sen. Patrick J. Leahy, chairman of the Judiciary Committee, said that Sen. Leahy would abide by the same blue slip policy as he had when he previously had been chairman (during the107th Congress). Under this policy, it was explained, both Senators from a state, regardless of party affiliation, would have to return a positive blue slip on a judicial nomination before it could be considered by the Judiciary Committee. Sarah Kellogg, "Michigan Senators Get More Say over Judges," *Mlive.com*, Jan. 5, 2007, accessed Feb. 23, 2007, at http://www.mlive.com.

[158] A news story in November 2007, for instance, cited Senators from five states—California, Michigan, New Jersey, Rhode Island, and Virginia—who had openly faulted the Bush Administration for not having consulted them about potential circuit court nominees from their states. Perine, "No Easing of Bush's Stance," p. 3315.

of the nominees during the 110th Congress.[159] For its part, the Administration has described its judicial nominees as "people who are qualified to serve and should be on our courts,"[160] calling for action on all of the nominations already sent forward, "with fair and open hearings and swift votes by the full Senate."[161]

Throughout the Bush presidency, the Judiciary Committee's blue slip policy has often been at the center of Senate debate over judicial nominations. In this debate, Senators have differed in their view of exactly how the policy has been applied in the past and how much control over lower court nominations the policy should confer on home state Senators. The latter issue, of whether the Judiciary Committee should consider a district or circuit court nomination if a home state Senator has not returned a favorable blue slip, is of continuing relevance in the 110th Congress. The Administration position (as indicated by the above quote calling for "swift votes" by the Senate on all pending nominations) is that the Judiciary Committee should consider each nomination, regardless of whether a blue slip has been returned. A rationale for this position was laid out in an April 2003 letter by then-White House counsel Alberto Gonzales. In a letter to two Democratic Senators, he explained why, in his view, the committee should not allow a home state Senator to block committee consideration of a judicial nominee:

> We agree strongly with the bipartisan policy maintained by Senators Kennedy, Thurmond, Biden, and Hatch as Chairs of the Judiciary Committee. We respectfully agree that the tradition of consultation does not and should not entail a veto for home-state Senators, particularly a veto wielded for ideological or political purposes. Rather, the intention of the Constitution and the tradition of the Senate require, in our judgement, that the full Senate hold an up or down vote on each judicial nominee. If the objections of home-state Senators to a nominee are persuasive, those objections either will deter the President from submitting the nomination in the first instance or, alternatively, will convince a majority of the Senate that the nomination should be rejected. As Senator Kennedy stated in 1981, however, the Senate has not allowed and should not allow "individual Senators [to] ban, prohibit, or bar" consideration of a nominee.[162]

The current chair of the Judiciary Committee, Senator Patrick J. Leahy (D-VT), however, has asserted, throughout the presidency of George W. Bush, that the committee—in keeping with the blue slip policy in effect during the period of the Clinton presidency when Republicans were in the Senate majority—should not act on a lower court nomination unless it has received positive blue slips from both home state Senators. In support of this position, Senator Leahy, in the first months of the Bush Administration, stated, as the committee's ranking Democratic member, that it had been "a longstanding practice of the committee for it to solicit and be guided by the views of home state Senators" and for it not to proceed "with action on a nominee without the return by both home state Senators of their blue slips." Such a policy, he said, "had the effect of encouraging the White House to consult with home state Senators in advance."[163] In a similar

[159] Ibid., for example, commenting that President Bush's "reluctance to consult with Democrats makes it likely that few, if any nominees from a state represented by a Democratic senator are going to receive a confirmation vote."

[160] Carrie Budoff Brown, "Bush Stirs Sparks on Judges," *The Politico*, Oct. 2, 2007, accessed Feb. 5, 2008, at http://www.politico.com, quoting White House spokeswoman Emily Lawrimore.

[161] Manu Raju, "Republicans Seek Quicker Action on Judges from the White House," *The Hill*, vol. 14, Oct. 4, 2007, p. 3, quoting White House spokeswoman Emily Lawrimore.

[162] Alberto R. Gonzales, counsel to the President, letter to Sen. Carl Levin and Sen. Debbie A. Stabenow, April 2, 2003, printed in "Stalled Nominations for the Sixth Circuit," *Congressional Record*, vol. 149, July 16, 2003, p. 18210.

[163] Opening statement of Sen. Patrick Leahy, ranking Democratic member, Senate Judiciary Committee, Committee Business Meeting, May 3, 2001, accessed May 3, 2001, at http://www.senate.gov/~judiciary/pjl050301e.htm. (Copy (continued...)

vein, in 2003, Senator Leahy objected to the holding of a committee hearing for a circuit court nominee who had not had two positive blue slips returned to the committee. He contrasted the blue slip policy then in effect with the policy applied during the Clinton Administration, which, he said, "operated as an absolute bar to the consideration of any nominee to any court unless both home state Senators had returned positive blue slips."[164]

Consultation Between the President and Home State Senators in the Current Environment

Under the Judiciary Committee's current blue slip policy, the objection of a home state Senator to a judicial nomination, registered by failing to return a positive blue slip, would doom the nomination's chances for committee consideration (and hence, also for Senate consideration and confirmation). Given that policy, the onus is on the Administration, if it hopes to see its nominee confirmed, not only to consult with the home state Senator but also, through a process of consultation, to select a nominee who is acceptable to both the Administration and the home state Senator. If the White House and a home state Senator cannot agree, the President would appear to have at least four options—to nominate someone objectionable to the home state Senator (and who thus would have a reduced chance of being confirmed), to decline to nominate someone at all (leaving the appointment in question to be made in the next Congress, by the next President), to make a temporary recess appointment (which would not require confirmation by the Senate), or to re-enter consultations with the Senator (in the hope of finding a nominee acceptable to both sides).

Reaching agreement on the choice of nominee, recent experience suggests, might not always be possible. It especially might be difficult when a presidential administration and a home state Senator differ over the criteria to use in selecting judicial nominees or over the policy goals to be served by judicial appointments, or when there are sharp partisan differences between the President and the opposition party in the Senate over judicial appointments. In such circumstances, however, the consultative process might sometimes present an opportunity for the Administration and home state Senator to resolve their differences. The process, for instance, might be an opportunity for the Administration to address, and seek to ease, concerns a home state Senator might have about a judicial candidate. Alternately, during consultation with the Administration, the Senator's input might, in particular circumstances, increase the chances for the selection of a "compromise" nominee, or one less objectionable to the Senator than a candidate under earlier consideration by the Administration.

As noted earlier, various policy statements by chairs of the Senate Judiciary Committee have listed various specific consultative steps which, at the time, the chairs regarded as requisite elements in consultation between an administration and home state Senators concerning the selection of lower court nominees. Although not binding on the Administration then or now, such statements can be seen as helping to identify points during the consultative process when Senators

(...continued)

available from author.)

[164] Statement by Sen. Leahy at an April 1, 2003, hearing on judicial nominations, in U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearings on Federal Appointments*, hearings, part 2, 108th Cong., 1st sess., Feb. 5, 12, March 12, 27, and April 1, 2003 (Washington: GPO, 2004), p. 997.

and the Administration might make a point of contacting each other before a nominee is actually selected.

For any given Senator, the actual consultative process that takes place between the Senator (or his or her staff) and the Administration will be unique to the situation at hand. For the particular judicial candidate search in question, there will be such unique elements as the extent and nature of input that the Senator conveys, whether he or she recommends specific candidates (and if so, the comparative strengths of the Senator's candidates vis-à-vis others the Administration might be considering), the predisposition of the Administration to the Senator's input, and a host other political factors that the Administration might have to take into account (including its own policy preferences for judicial nominees).

A President, experience has shown, sometimes nominates a judicial candidate other than one favored by a home state Senator, often, by custom, doing so when the home state Senator is of the opposition party. Whether the President, when making such a choice, has shown due respect for the advisory part of the Senator's advice and consent role will be a personal question for the Senator to answer—but one also of likely interest to other Senators concerned about the nature of their advice and consent prerogatives as home state Senators. Of key relevance to the question will be the extent to which the Administration consulted with the Senator or the Senator's staff, and whether it did so with an apparent openness to the Senator's views.

Author Contact Information

Denis Steven Rutkus
Specialist on the Federal Judiciary
drutkus@crs.loc.gov, 7-7162