

# FEDERAL JUDICIAL APPOINTMENTS GAVEL TO GAVEL

Getting to the federal bench can be thought of in two phases: (1) nomination and (2) confirmation. The Executive Branch has the power to appoint and the Legislative Branch is charged with selection and confirmation.

## \* NOMINATION \*

- The applicant fills out a 25 – 30 page application detailing personal history and career history, including a disclosure of friends, colleagues, clients, and opposing counsel. Personal history includes financial disclosures and any criminal history. The word of wisdom is to disclose rather than to get bumped by a surprise to someone in the chain of the decision-making process.
- At the district court level, the home state senators or a selection committee designated by the home state senators -- often comprised of bar association leaders of the state -- vet the candidates. The Circuit Court of Appeals level is more complex because it is a decision that must be satisfactory to multiple states, the states that make up the particular circuit.

At the district court level, some states have a very informal vetting process or no real process at all. In contrast, states such as California and Wisconsin have a very formal vetting process, with a bi-partisan selection committee.

## THE WHITE HOUSE REVIEW AND \* CONFIRMATION \*

This is the world of politics. The applicant is no longer in charge.

- The process varies from administration to administration but some key milestones remain the same.

The Bush administration generally defers to the state if the process of vetting candidates was done in a bi-partisan manner and the White House has no other candidate in mind. It also looks to the highest-ranking Republican in the state, say the governor, for any comment on the recommendations.

- The White House requests an FBI check of the candidate. This process can take 1 to 3 months, depending on the FBI's workload. The FBI then puts together a "BI" -- a Background Information packet -- for the White House. The White House then has to make a decision on whether to nominate the candidate. This is often a "political gut check." Will the candidate get through the confirmation process? Are there any potentially embarrassing moments for the politicians supporting the candidate?
- If the candidate passes muster with the White House, the White House issues an "Intent to Nominate" and announces the candidate. This is as formal as the White House gets. Until the requisite paperwork is received by the Senate, the forwarded candidate is not yet a "nomination."
- The candidate is now in the hands of the Senate Judiciary Committee, comprised of 19 members. The Senate Judiciary Committee has a special staff of investigators to sort through information on a candidate. The "questionnaire" becomes public information and is duplicated

for all members of the Committee. Confidential information such as finances and criminal history are locked in a safe.

- The “blue slip” process. The chair of the Senate Judiciary Committee then schedules a hearing, if inclined to do so. The chair first issues two “blue slips” to the nominee’s home state senators for a “yes” or “no” and any other comment. Once the “blue slips” come back, the chair can schedule a hearing. Scheduling of the hearing is dependant on the “blue slip” process, but sometimes a chair will schedule a hearing over objections of home state senators.
- Once a confirmation hearing is scheduled, the nominee becomes “open game.” Letters from the public and opposition, if any, generally come in and are considered by senators receiving such correspondence.
- The “mark-up” process. The “mark-up” process refers to the Senate acting on a nomination or a piece of legislation. The Senate only acts on items moved out of committee and affirmatively placed onto a calendar. The Executive Calendar contains nominees and treaties for consideration. The Legislative Calendar contains all other matters. The Senate Judiciary Committee is the only committee that meets every week, meeting every Thursday at 9:30 AM. A vote is taken and if successful, the nominee is moved out of committee to the Executive Calendar for a vote by the Senate as a whole.
- Getting “Borked.” Filibustering in the Senate can de-rail a candidate. The tactic effectively raises the bar on confirmation from a simple majority under constitutional rules to 60 percent required to end a filibuster. Political tactics are par for the course in partisan politics. In 1987, Democrats in a then-Democratic controlled Senate were able to bounce Judge Robert Bork’s nomination to the Supreme Court with questions about his character and bringing to light some extreme views. Currently, a “nuclear option” is being considered to change filibuster rules, to lower the 60 votes necessary to close debate. Senate Majority Leader Bill Frist (R - Tenn.) has vowed to fight the 60-vote standard.