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

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Summary

This report examines the role that home state Senators, historically and in the contemporary era, have played in the selection of nominees to U.S. district court and circuit court of appeals judgeships. It also identifies issues that have arisen in recent years over the role of home state Senators in the selection process for federal judges. Report findings include the following:

- 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 district court judgeships in their states. They also have played an influential, if not primary, role in recommending candidates for 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.
- In recent and many past Congresses, the Judiciary Committee's blue slip procedure has reinforced Senators' influence over judicial nominations in their state by permitting nominations to receive committee action only when both home state Senators have returned "positive" blue slips.
- Senators, in general, exert less influence over the selection of circuit court nominees than they do over district court nominee selection. 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 may depend, to a great extent, on their respective prerogatives, party affiliations, 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, the qualifications of the nominee, and the possibility of better opportunities in the future to exert 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? Conversely, should the Judiciary Committee and the Senate, as matter of courtesy, approve judicial nominees supported by home state Senators?
- Should home state Senators use commissions to aid them in selecting judicial candidates to recommend to the President?

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Introduction

This report examines the role played by Senators in the selection of nominees to two kinds of lower federal court judgeships. Specifically, the judgeships in question, over which Senators have historically played a role in nominee selection, are those (1) in the U.S. district courts lying geographically within the Senators' states and (2) in the U.S. court of appeals circuits of which the Senators' states are a geographic part.[1]

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,[2] 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.[3] 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.

In separate sections this report discusses

[1] 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. (Accordingly, 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, the territorial district courts, 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.) Limited in scope to appointments to courts with geographic links to the states of home state Senators, this report also does not cover judicial selection to such federal courts of specialized subject matter jurisdiction as the U.S. Court of Federal Claims, the U.S. Tax Court, and the U.S. Court of Appeals for Veterans Claims, whose judicial appointees may come from any state in the union.

[2] 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; 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."); Seth Stern, "Bench-Clearing Brawl Continues," *CQ Weekly*, vol. 68, September 27, 2010, p. 2213; and Dan Friedman, "Confirmation Fights Stall Justice System" *National Journal Daily*, February 1, 2012, at http://www.nationaljournal.com.

[3] 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.")

- 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;
- the lesser role that Senators play generally when recommending circuit court, as opposed to district court, candidates;
- the processes 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, of home state Senators in the selection of nominees for U.S. district and circuit court judgeships.

Before proceeding with these sections, however, **Figure 1**, below, provides a visual overview of the judicial districts in each state and the judicial circuit of which each state is a part. **Figure 1** does so, for the judicial districts, by showing the geographic boundaries for the 89 district courts that lie within the 50 states.[4] Dotted lines within a state indicate the division of that state into two or more judicial districts, showing the geographic areas the districts cover in the state.[5] The absence of dotted lines within a state, on the other hand, indicates that the state constitutes one undivided judicial district.[6] (For an alphabetical listing of the 50 states, indicating which states have multiple judicial districts as well as the number of authorized judgeships for each of the districts, see 28 U.S.C. §133.) Courts within the U.S. courts of appeals system are divided geographically into 11 enumerated circuits, with each of these circuit courts including at least three states. **Figure 1** shows the states (as well as, in some cases, U.S. territories) located within each of the enumerated circuits by the different areas of shading associated with the circled numbers 1 through 11.[7]

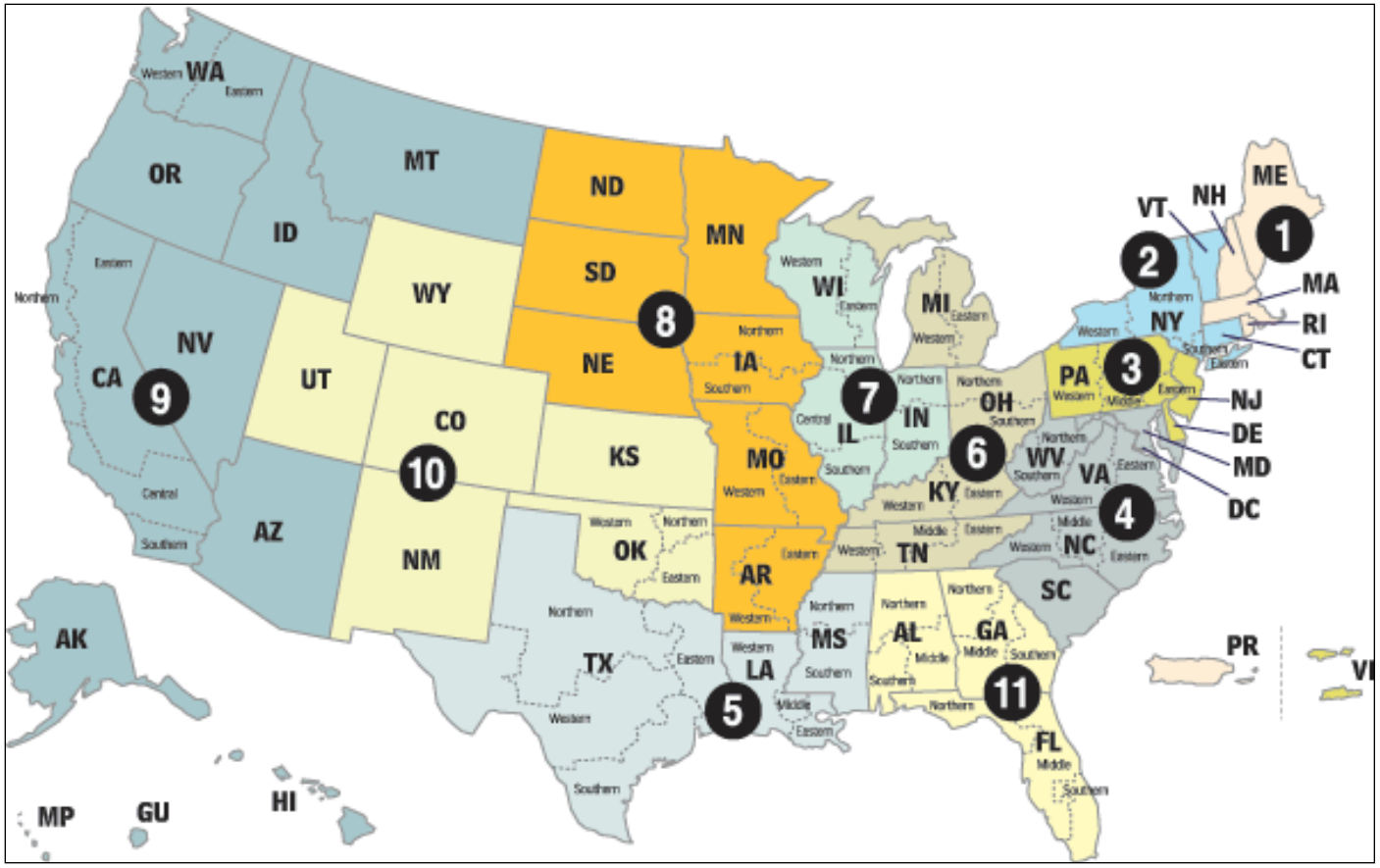
[4] Also shown in the map, with their respective name abbreviations, are the judicial districts for the District of Columbia (DC), the Commonwealth of Puerto Rico (PR), and the territories of Guam (GU), the Virgin Islands (VI), and the Northern Mariana Islands (MP).

[5] For a complete listing, by state, of the counties within each judicial district, see 28 U.S.C. §§81-131.

[6] Specifically, 25 states have one judicial district each. The other 25 states have 2 or more judicial districts, with the 3 most populous states—California, New York, and Texas—each having 4. Each district court has from 2 to 28 federal district judgeships. With 2 judgeships each are the U.S. District Courts for the Districts of Idaho, Northern Iowa, North Dakota, Vermont, and Western Wisconsin. With the most judgeships are the U.S. District Courts for the Districts of Southern New York (28), Central California (27), Northern Illinois (22), and Eastern Pennsylvania (also 22).

[7] In the following pages, nominations to U.S. courts of appeals judgeships are referred to as circuit court nominations, and the courts are referred to as circuit courts.

Figure 1. Geographic Divisions of U.S. District and Circuit Courts



Source: Administrative Office of the United States Courts.

Note: Dotted lines within a state indicate the division of that state into two or more U.S. judicial districts. The absence of dotted lines within a state indicate that the state constitutes one undivided judicial district. Different areas of shading associated with the circled numbers 1 through 11 show which states are located within each of the enumerated judicial circuits. Not shown in the above map is a 12th geographically based U.S. circuit court of appeals, located in the District of Columbia.

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.[8] 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."[9] 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."[10]

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 and how to report a nomination to the Senate) or on the Senate floor (on whether to confirm).[11] 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

[8] 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 district 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).

[9] 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."

[10] 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, September 2004, pp. 656-673; CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead; and CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue, who notes that Presidents "have long made recess appointments to the federal judiciary" but that "in recent years ... recess appointments of federal judges have been unusual and controversial."

[11] 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").

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 a 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.[12]

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 has historically been filled by a resident of the Senator's state. For these judgeships, long-standing Senate customs, as well as norms in 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."[13] 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

[12] 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*.)

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

opposing a nomination if "his reasons are not persuasive to other senators or if he is not a respected member of the Senate."[14]

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 potentially 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,*[15] 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 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. [16]

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."[17]) Another scholar, less than a decade earlier, in 1944, had described as near-absolute the power of home state Senators of the

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

[15] 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.

[16] Ibid., p. 41

[17] Ibid, p. 314.

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."[18]

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.[19]

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 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 to perform."[20] In 1989, similar sentiments were expressed by Senator Thad Cochran 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.[21] 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-RI) to advise President Bush of the senators' support for Jeffords' choice."[22] Ultimately, the candidate recommended by Senator Jeffords was nominated by President Bush and confirmed by the Senate by a voice vote.[23]

The view of Senators over time, 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.[24] The custom serves as an inducement to the

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

[19] 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.

[20] Joseph W. Tydings, "Merit Selection for District Judges," *Judicature*, vol. 61, September 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."

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

[22] Ibid.

[23] See Walter R. Mears, "A Battle of Wills over Picking Federal Judges," *Associated Press*, August 16, 1990, at http://www.lexisnexis.com.

[24] 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."

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 have rarely gone 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.[25]

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 had generally been 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."[26] 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

(*Emphasis* in original.)

[25] 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 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. See also Bob Rankin, "'Senatorial Courtesy' Derails Ford Judgeship Nomination," *Congressional Quarterly Weekly Report*, vol. 34, May 8, 1976, pp. 1123-1125.

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*, August 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*, September 21, 1980, p. A1; and Goldman, *Picking Federal Judges*, pp. 262-264.

[26] 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.

judges, besides having necessary professional qualifications, meet other criteria of particular importance to the President[27] 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.[28] Further, one recent 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.[29]

Subsequent Presidents, however, did not insist, as President Carter did, that Senators use nominating commissions to select district court candidates, and over the next few decades their use was discontinued by most Senators. Nonetheless, the last five years have witnessed somewhat of a comeback for nominating commissions, with more than one-third of the Senate's Members recently reported to be using them.[30]

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

[27] For instance, in an executive order signed on November 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, November 13, 1978, p. 52455. (Executive order revoked by President Ronald Reagan on February 25, 1986. See "Executive Orders Disposition Tables," at http://www.archives.gov/federal-register/codification/executive-orders-16.html.) 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 spoke 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.")

[28] 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 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.

[29] 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, February 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, November 18, 1978, p. 3313.

[30] The 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."

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 this 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 their state.

The blue slip policy of the Senate Judiciary Committee, as set by its chair, dates back at least to 1917.[31] 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 response.[32] 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.[33] 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.[34] 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.[35]

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[31] 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?")

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

[33] Ibid., p. 9.

[34] 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.

[35] 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."

Since 1979, however, deference to home state Senators using the blue slip to block or delay judicial nominees has not always been automatic. Some chairs of the Judiciary Committee, including those from the 109th through the 112th Congresses, have permitted committee action on a judicial nomination only when both home state Senators returned positive slips.[36] The committee under other chairs, by contrast, has considered a judicial nomination with receipt of only one positive blue slip,[37] or on a few occasions, without a blue slip from either home state Senator."[38]

While the blue slip policies of 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.[39] Pre-nomination consultation, a 2003 analysis concluded

> 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.[40]

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

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[36] For a description of the Judiciary Committee's blue slip policy during the 109th and 110th Congresses, see Mitchel A. Sollenberger, "The Blue Slip: A Theory of Unified and Divided Government, 1979-2009," *Congress & the Presidency*, vol. 37, May-August 2010, pp. 146-147 (policy during 109th Congress) and pp. 149-150 (policy during 110th Congress). In evident reference to the committee's blue slip policy during the 111th Congress, the chair of the committee, a Democrat, stated during floor debate, "I have respected the minority. I have not brought up people who did not have the support of their Republican home State Senators." Sen. Patrick J. Leahy, "Nomination of Jane Branstetter Stranch to be United States Circuit Judge for the Sixth Circuit," remarks in the Senate, *Congressional Record*, daily edition, vol. 156, September 13, 2010, p. S7009. During the 112th Congress, the same Senator, as committee chair, reaffirmed this policy at a hearing on judicial nominations. See March 16, 2011, testimony of Sen. Patrick J. Leahy, in U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearings on Federal Appointments*, 112th Cong., 1st sess, February 2 and 16, and March 16, 2012, S.Hrg. 112-72, Pt. 1 (Washington, DC: GPO, 2011), p. 1411.

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

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

[39] 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 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, April 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.

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

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.[41]

In sum, the Judiciary Committee's blue slip policy in recent decades, as applied in somewhat varying ways by different chairs, appears always to be 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.

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 roles, 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 just described. This particularly might prove to be the case if the Senators are perceived as having an ability and inclination to block nominations (either through use of the Judiciary Committee's blue slip procedure or through Senate floor tactics such as the filibuster), unless afforded an enhanced role in judicial nominee selection.

When One Senator Is of the President's Party

As already discussed,[42] 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

[41] 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.

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

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.[43]

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 concern over a candidate, finding him or her unacceptable or in some way problematic 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, 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."[44]

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.[45] 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

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[43] 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*.)

[44] Ibid., p. 590.

[45] 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, January 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. Shortly after the start of the presidency of Barack Obama, Florida's Democratic Senator announced a revamped membership of the longstanding Florida Judicial Nominating Commission (JNC); he stated that he had named a new commission head, in cooperation with the state's other U.S. Senator, a Republican, and that the two had agreed upon a new set of rules under which the JNC would recommend judicial candidates for the Senators to interview for possible forwarding to the White House. Sen. Bill Nelson, "Former Anti-Public Corruption Prosecutor to Head Statewide Panel Screening Judicial Candidates," news release, February 27, 2009, at http://billnelson.senate.gov/news/details.cfm?id=308825&.

recommendations. The options are not exhaustive but, rather, identify different degrees of consultation or cooperation about judicial candidates that could 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 that evaluates and screens judicial candidates before the first Senator decides whom to recommend.
- 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;[46] 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.[47]

[46] 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.

[47] 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 Senators in opposition to a home state nomination.

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.[48]

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 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.[49]

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[48] 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 to congressional clients upon request.)

[49] Illustrative of this, California's Democratic U.S. Senators in early 2009 each created advisory committees in the state's four federal districts to alternate recommending potential candidates to President Obama for federal judgeships, as well as for U.S. attorney and U.S. marshal positions. These committees were to screen and interview applicants for vacant positions. "Senators Feinstein, Boxer Announce Plans to Recommend Judicial Nominees to President-Elect Obama," *Congressional Press Releases*, December 29, 2008, at http://www.nexis.com. During May 2011 Senate floor debate on a nomination to a U.S. district court judgeship in California, one of the state's Senators described the arrangement in which she and her colleague took turns recommending district court candidates to the President:

> I wish to thank Senator Feinstein for her hard work and her leadership in support of Judge Chen's nomination. I think the way we do our judge recommendations is exemplary. What we do is, we each have a committee that advises us, and they come up with the names of a few people who they

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.[50] 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.

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 nominee 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 Administration "would attempt to counter the will of both senators."[51]

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.

> think are the top choices. Then, each of us make s that recommendation to the President. Judge Chen was her nominee.

Sen. Barbara Boxer, "Nomination of Edward Milton Chen to be U.S. District Judge for the Northern District of California," remarks in the Senate, *Congressional Record*, daily edition, vol. 157, May 10, 2011, p. S2827.

[50] 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).

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

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.[52] 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:

- 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.[53]

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"[54] (the state's senior Democratic House Member).[55]

Likewise, at the start of the 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

[52] *Citizen's Handbook Supplement*, 15 p.

[53] Ibid., 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.

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

[55] 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*, December 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*, January 16, 1995, p. A5.

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."[56] 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."[57]Subsequently, after the presidential inauguration of Barack Obama in January 2009, Democratic officials in some states without Republican Senators assumed the role of recommending judicial candidates in arrangements consistent with those reached between non-Senators and previous Presidents.[58]

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.[59] As a scholarly study has noted, until recent decades,

> 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 ... 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.[60]

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.[61]

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

[57] Ibid., p. 8.

[58] A periodically updated state-by-state survey of federal judicial selection reported in April 2010 that in at least four states—Alabama, Georgia, Maine, and Texas—House Democrats, either individually or as a delegation, had established their own processes to screen for and recommend candidates to U.S. district court judgeships. In the case of Alabama, the state's Democratic Party had also formed a judicial candidate screening panel. American Judicature Society, "Federal Judicial Selection," at http://www.judicial selection.us.

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

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

[61] "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.

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 situations

> 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.[62]

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.[63] 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.[64] 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.[65] 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.[66] The Florida commission marked "the first time in more than 135 years" that Senators "who were not

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

[63] 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

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

[65] 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.

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

in the President's party played a substantial formal role at the stage before the official nominations of persons for district court judgeships."[67]

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.[68] 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.[69] 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."[70]

More recently, the Republican Administration of President George W. Bush, in a few cases, accepted a formal role for a state's two Democratic Senators in judicial candidate selection. In at 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.[71]

In each of the aforementioned four states, the role of opposition party Senators in the selection process 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, were also reviewed by

[67] Ibid., p. 24.

[68] Nina Totenberg, "Will Judges Be Chosen Rationally?" *Judicature*, vol. 60, August-September 1976, p. 95.

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

[70] 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-August 2002, p. 17.

[71] See Sen. Dianne Feinstein, "Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel," news release, May 22, 2001, 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 to congressional clients upon request); Katherine Pfleger, "Senators, White House Might Be Close to Resolution on Federal Judicial Nominee," *Associated Press*, March 18, 2002, 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 to congressional clients upon request); and Eric J. Frommer, "White House Nominates Wisconsin State Judge for Federal Judgeship," *Associated Press*, November 14, 2003, 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.

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.[72]

Most recently, during the presidency of Barack Obama, district court nominees in at least one state, Texas, reportedly have been selected only after being formally recommended by the state's two opposition party Senators. For each vacant U.S. district court judgeship in Texas, President Obama has received judicial candidate recommendations from both the Senators as well as from Texas's Democratic congressional delegation. In each case, the President reportedly has selected a nominee who was recommended by both the Senators and the House Members. To assist them in making their recommendations, the Senators used a judicial evaluation committee that vetted judgeship applicants. [73]

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, was in place in Illinois during the final two years of the last Bush Administration, according to the state's two Democratic Senators.[74]

Lesser Role for Senators When Recommending Circuit Court Candidates

Senators generally exert less influence over the selection of circuit court nominees than over the 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

[72] 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*, August 5, 2003, p. 3A.

[73] See description of the "federal judicial evaluation committee" used in Texas by Republican Senators John Cornyn and Kay Bailey Hutchison, and accompanying note that "Members of the state's Democratic congressional delegation are also recommending candidates to fill vacant federal positions in the state," in American Judicature Society, "Federal Judicial Selection," at http://www/judicialselection.us./federal/. See also the remarks of Senator Hutchison during recent Senate floor consideration of two nominees to U.S. district court judgeships in Texas, in which she described the process used by her and Senator Cornyn "that assures we nominate to the President the most qualified people to fill these spots." Senator Kay Bailey Hutchison, "Nomination of Gregg Jeffrey Costa to be United States District Judge for the Southern District of Texas; Nomination of David Campos Guaderrama to be United States District Judge for the Western District of Texas," remarks in the Senate, *Congressional Record*, daily edition. vol. 158, April 26, 2012, p. S2759. As illustrative of press reports on the recommending function in Texas performed by both home state Senators and House Members of the President's party, a July 20, 2011, story reported that the Senators' recommendation of the afore-noted Costa and Guaderrama to be district judges in Texas "concurs with the Texas Democratic congressional delegation," which the report said had earlier urged the President to nominate the two individuals. See Gary Martin, "State's Senators Recommend Two for Federal Bench," *The Houston Chronicle*, July 20, 2011, at http://www.nexis.com.

[74] In floor remarks during Senate consideration of a district court nomination in 2007, 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, November 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, November 13, 2007, p. S14239.

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.

Lesser Role Well Established by Custom

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."[75] 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."[76]

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.[77] 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.[78] (The Senators, however, were consulted for their views about the commission's recommendations before President Carter actually selected a nominee.)

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.[79] 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."[80]

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."[81] At the end of the Clinton

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

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

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

[78] 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, December-January1984, pp. 267-268.

[79] 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.

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

[81] 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 to congressional clients upon request.)

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."[82]

Subsequently, in the presidencies of George W. Bush and Barack Obama, 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 President Bush's circuit nominees tended "to be generated more by the Administration" than by Senators,[83] with instances of Senators having President Bush select their candidates for circuit judgeships being exceptions to the rule.[84] Similarly, President Obama, an Administration source said early in the Obama presidency, "retains the prerogative" to select circuit court nominees on his own, independently of Senators' recommendations.[85] By early April 2010, according to another Administration source, of 18 persons nominated by that point to circuit judgeships, President Obama had selected 12 who were not candidates recommended by home state Senators.[86]

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[82] "Clinton Nominee Kent Markus: Judicial Delays Are Hurting the Country," nationaljournal.com, June 20, 2001, "Insider Interview," 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 February 9, 2000. His nomination, however, received no action in the Senate and was returned to the President on December 15, 2000, at the end of the 106th Congress.

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

[84] For mentions of a few instances in 2001 and 2002, when Republican Senators persuaded President Bush to 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, December 2006, p. 725.

Further, in 2008, the last year of President Bush's Administration, President Bush in three instances—each time facing opposition from home state Senators to specific circuit court nominations—withdrew the nominations and selected new nominees recommended by the Senators. In one case, President Bush selected a new nominee from Michigan (to a Sixth Circuit judgeship) specifically recommended by that state's two Democratic Senators. Ken Thomas, "Bush Nominates Michigan Appellate Judge to 6th Circuit Slot," *Associated Press*, April 15, 2008, at http://www.lexisnexis.com; David Ashenfelter, "White House Nominates 2 for Courts," *Detroit Free Press*, April 16, 2008, p. 5, at http://www.lexisnexis.com. In a second instance, opposition by Pennsylvania's Democratic Senator to a nominee to the Third Circuit reportedly prompted the President to select a new nominee from Pennsylvania recommended jointly by that Senator and the state's Republican Senator. Shannon P. Duffy, "Five Tapped for Federal Bench Openings in Pennsylvania," *Law.Com*, July 25, 2008, at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423251503; Kimberly Hefling, "Bush Nominates Five to Bench in Pa.," *Associated Press*, July 24, 2008, at http://www.lexisnexis.com. In a third case, the President selected a new nominee from Virginia (to the Fourth Circuit) recommended jointly by that state's Senators, one a Republican and the other a Democrat; the President's earlier nominee had been criticized by both Senators and opposed by the latter. Manu Raju, "Judicial Nominee Withdraws Amid Democratic Criticism," *TheHill.com*, January 18, 2008, at http://www.thehill.com; "Bush Nominates Va. Judge to Fill Vacancy on 4th Circuit," *Law.Com*, May 12, 2008, at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202421291011.

In a fourth instance, the President made an initial selection of a circuit court nominee from among a list of persons recommended jointly by the two Senators of the nominee's state. The nominee, a Virginian nominated to a Fourth Circuit judgeship, was reported to be one of several people that Virginia's two Senators had jointly recommended to President Bush "after conducting a [nominee] search of their own." Deb Riechmann, "Bush Nominates Va. Justice to Fill Vacancy on 4th Circuit," *Associated Press*, March 14, 2008, at http://www.lesixnexis.com.

[85] Cassandra Butts, Office of the White House Counsel, Deputy Counsel to the President, telephone conversation with the author, May 13, 2009. (Hereafter cited as Cassandra Butts, May 13, 2009, telephone conversation.)

[86] Statement of Jonathan Kravis, Office of the White House Counsel, Associate Counsel to the President, provided by Rhonda Carter, Special Assistant to the White House Counsel, in telephone conversation with the author, April 9, 2010. (Hereafter cited as Jonathan Kravis, April 9, 2010, statement.) Author provided Carter with written description of what author understood to be the role of the White House counsel's office in Obama Administration judicial candidate selection, inviting "feedback" from the office concerning the accuracy of that description. Information cited here, or in

Eleven of the 13 U.S. circuit courts of appeals, it will be recalled, are geographically based courts encompassing three or more states.[87] 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."[88] 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.[89] 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.[90]

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.[91] 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.

Senators' Prerogatives in Circuit Nominee Selection

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

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other footnotes attributed to Kravis, was provided orally by Carter, in an April 9, 2010, telephone conversation with author.

[87] As discussed earlier, there is also a 12th geographically based federal court of appeals—the U.S. Court of Appeals for the District of Columbia, geographically encompassing only the District of Columbia. Like the other 11 geographically based circuit courts, it considers appeals of federal trial court cases decided within the circuit. A 13th 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.

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

[89] 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.

[90] A CRS report updated on May 18, 2009, found that, from the presidency of Lyndon B. Johnson (1963-1969) to the update of that report, 87% 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 Circuit Courts*, by R. Sam Garrett.

[91] 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, §307.

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."[92] 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.[93] Hence, input from such Senators in forceful opposition to the candidate amounts to a "negative recommendation" that the Administration would likely take very seriously, to avoid Senate rejection of the candidate based on senatorial courtesy.

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.[94] 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.

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

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

[94] SeeCRS 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'," C*ongressional Quarterly Weekly*, vol. 62, June 18, 2004, p. 1479.

Role of Senators If State Representation Is Changed

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.

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." It should be emphasized that 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.[95]

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.[96]

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[95] See "Background" section of CRS Report RS22510, *"State Representation" in Appointments to Federal Circuit Courts.* 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, 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*, December 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 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, February 15, 2007, p. S1986 (each statement discussing both the Virginia-Maryland and Idaho-California controversies).

[96] 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

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 website[97] 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 another of future court vacancies, both arranged by judicial circuit.[98] 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 depends, 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 experienced 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

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, at http://www.uscourts.gov/judconfindex.html.

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

[98] Within the website, a list of current district and circuit court vacancies can be accessed at http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx. A list of future court vacancies (including, for each judgeship in question, the date that the vacancy will take effect) can be accessed at http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx.

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, in some way, the candidate selection role 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 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; it also, in some instances, might be a suitable arrangement for sharing the candidate recommending function with a junior Senator of the same 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 Senators' 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.[99] 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.

[99] As noted earlier, 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."

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 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.

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. In nearly all cases, a fundamental starting requirement for a Senator engaged in the search for judicial candidates presumably 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."[100] 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

[100] 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.

to nomination or immediately after the nomination is made.[101] 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."[102] 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.[103] A scholarly study of the judicial appointment process cites two reasons why most nominees for judicial office "must have some record of political activity....":

> 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.[104]

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 candidate'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 on 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 ideological direction, if any, 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

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[101] 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, at http://www.abanet.org/scfedjud/.

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

[103] Ibid.

[104] Ibid., p. 242.

ideological criteria applied would vary among Senators, reflecting their individual views regarding the courts, the Constitution, and public policy.[105]

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 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.[106]

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,[107] 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."[108] He described two somewhat different approaches that he had

[105] 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 September 4, 2001 (Washington: GPO, 2002), pp. 1-109.

[106] 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, October 2010), p. IV-43.

[107] 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, November 12, 2003, concluded on the morning of Friday, November 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, November 12, 2003, pp. S14528-S14785.

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

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.[109]

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.[110] 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 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).[111]

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.[112] 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 applicant.
- Applications must be submitted, and the commission's evaluation of applications completed, by specified deadlines.

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[109] Ibid.

[110] 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.

[111] Ibid.

[112] 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, at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html.

- 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 state or county judges, as well as leaders of community groups, and they often, if not always, represent both political parties.[113]

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.[114] By 1980, the last full year of the Carter presidency, senatorial commissions were operating in 31 states.[115]

Although President Reagan in 1981 disbanded the commission created by President Carter to identify circuit court candidates,[116] 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.[117] In the years that followed, however, senatorial use of nominating commissions decreased substantially. In November 2007, a Brookings Institution study reported that at that time 16 Senators in 8 states were using commissions. The study found that most of these 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.[118]

Since the Brookings study, an increased number of Senators reportedly have been using commissions or similar entities to aid them in screening and evaluating candidates for federal

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[113] For thumbnail descriptions of the structure and operations of nominating commissions currently used in the federal judicial selection process in certain states, see American Judicature Society's "Judicial Selection in the States" website, at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FDsee. 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, November 20, 2007, p. 12, at http://www.brookings.edu/. (Hereafter cited as Wheeler, "Prevent Federal Court Nomination Battles.")

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

[115] Ibid.

[116] Ibid., p. 290.

[117] 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, Section 1, p. 11.

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

judgeships. In October 2012, the American Judicature Society, on its website, identified 19 states in which 34 Senators were listed as using commissions or formal panels or committees to review judicial candidates.[119] In addition, in three states where neither U.S. Senator was of the President's party, panels used to identify, screen, and recommend judicial candidates to the President had reportedly been established by House Members of the President's party.[120] (The entities were established either by the senior House Member of the state's congressional delegation or by the entire House party delegation.)

The increased use by Senators of judicial nominating commissions was underscored in a 2010 report entitled *Options for Federal Judicial Screening Committees*.[121] The report, issued by two nonpartisan organizations,[122] stated that its purpose was to describe how judicial "screening committees" (a phrase it said it preferred over "judicial nominating commissions") have been constructed and how they typically have worked. The report, at the outset, identified reasons why Senators might choose to use such committees. These, it said,

> included a hope that an individual who enjoys the endorsement of a committee may move to nomination and confirmation more quickly. … Other advantages of a committee process may include the ability to screen applicants and catch problems before any ABA or White House involvement; providing a voice to varied constituencies, including non-lawyers and members of both political parties; and inviting applications from individuals who might not otherwise come to the senators' attention.[123]

A frequently stated senatorial objective in using nominating commissions is to make the judicial selection process less partisan. A Senator in 2011, for example, declared that in "recent years, judicial selections at the national level have too often become overly politicized." For that reason, he said, he was pleased that he and the state's other Senator (the former a Republican, the latter a Democrat) had reached a bipartisan agreement to establish three "judicial nomination advisory panels" in their state, which would "go a long way to make sure excellent candidates are nominated and confirmed."[124] In the same vein, another Senator, also in 2011, stated that he and the state's other Senator, of opposite party affiliations, "have tried to take the politics out of the

[119] See The American Judicature Society, "Federal Judicial Selection," at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD.

[120] Ibid.

[121] The Governance Institute and the Institute for the Advancement of the American Legal System, Options for Federal Judicial Screening Committees: Things to Consider in Establishing and Operating a Committee to Advise Legislators about Candidates for District Judgeships (and Other Judicial System Positions), June 2010, 26 p., at http://www.brookings.edu/research/papers/2010/07/02-federal-judicial-wheeler. (Hereafter cited as Governance Institute, Options for Federal Judicial Screening Committees.)

[122] The report was prepared jointly by the Brooking Institution's Governance Institute and the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver. In the report's preface, the Governance Institute described itself as "a small non-partisan organization in Washington, D.C. that explores problems associated with the separation of powers in the federal system, including the gap between courts and Congress, contentiousness in federal judicial selection, courts and the media, and inspectors general and other aspects of the federal bureaucracy." IAALS described itself as a "national, non-partisan organization dedicated to improving the process and culture of the civil justice system." Ibid.

[123] Ibid. (Executive Summary). Subsequently, in September 2011, a second edition of this report was issued. See The Governance Institute and the Institute for the Advancement of the American Legal System, *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them*, second ed., September 2011, 37 p., at http://iaals.du.edu/library/publications/options-for-federal-judicial-screening-committees-second-edition, or at http://www.brookings.edu/research/reports/2011/09/13-judicial-screening.

[124] Sen. Patrick J. Toomey, "Senators Casey and Toomey Announce Bipartisan Agreement on Judicial Vacancies," news release, April 26, 2011, at http://toomey.senate.gov.

selection of judges by letting the interviewing process, the selection process, be done by a panel of prominent citizens called a judicial nominating commission."[125]

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. This was the case, for instance, in Wisconsin, where, from 1995 to 2010, the state's two Democratic Senators used a commission to advise them in the selection of candidates to fill U.S. district court vacancies in that state (as well as candidates for vacancies for U.S. attorneys in Wisconsin and U.S. circuit court judgeships which were "appropriately considered Wisconsin seats"). The charter for the commission laid out its rules of procedure in detail. The charter provided that the commission would 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 could appoint to the commission varied, depending on whether the Senator was of the same political party as the President.[126] When a court vacancy occurred, the charter provided specific timetables for seeking candidates and accepting applications, as well as for evaluating the candidates' qualifications. Further, the charter set 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 stated that after the commission had designated from four to six individuals as best qualified to fill a vacancy, the commission would immediately notify the state's Senators as to the individuals' names.[127]

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.[128]

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[125] Sen. Bill Nelson, "Executive Session," remarks in the Senate, *Congressional Record*, daily edition, vol. 157, October 19, 2011, p. S6714.

[126] "Wisconsin Federal Nominating Commission Charter," 6 pp., at American Judicature Society website link, at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD under "Wisconsin" heading. 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 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.

[127] Ibid.

[128] 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

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 Administrations, officials in the Department of Justice consulted with Senators about judicial appointments. Thus far during the presidency of Barack Obama, however, the White House counsel's office has played the primary liaison role with Senators regarding judicial appointments (as it did during the presidency of George W. Bush). As the primary consultative link with Senators, it is this office that ordinarily receives Senators' recommendations of specific individuals for judicial appointment.[129]

In recent presidential Administrations, the task of evaluating the background and qualifications of judicial candidates has been apportioned between key staff persons in the White House counsel's office and the Department of Justice.[130] These staff, aided by the research of subordinate White House or DOJ personnel, as well as by investigations of the Federal Bureau of Investigation (FBI) into the backgrounds of judicial candidates, decide 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).

commissions' lists and select one or more candidates from their lists for each vacancy." Neff, *United States District Judge Nominating Commissions*, p. 65.

[129] Cassandra Butts, May 13, 2009, telephone conversation. More recently, another Obama Administration official has stated, in the same vein, that the White House Counsel's Office does "all the outreach to the home state Senators or the legislative delegation in the case of states where there are two Republican Senators and no Democrat. They do all the intake, decide which of the nominees that are in play at this stage should be evaluated further, and send us a name." Interview statement by Christopher Schroeder, Assistant Attorney General, Office of Legal Policy, Department of Justice, in Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "Obama's Judiciary at Midterm: The Confirmation Drama Continues," *Judicature*, vol. 94, May-June 2011, p. 264. (Hereafter cited as Goldman et al., "Obama's Judiciary at Midterm.") Likewise, 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 January 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." 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.

[130] In the Administration of President George W. Bush, the lower court nominee selection process was 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).

- 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).[131]
- 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.[132]
- 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:

- 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.

[131] 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.

[132] The committee in question is the ABA's Standing Committee on the Federal Judiciary. From 1952, during the last months of the Truman presidency, to the end of the Clinton presidency in 2001, the Standing Committee 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 to congressional clients upon request.) 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. Excluded from making pre-nomination evaluations, the committee, for the remainder of the Bush presidency, performed an evaluation of judicial candidates only after their nominations had been made by the President. (Evaluations were then sent to the Senate Judiciary Committee, which typically awaited receipt of the ABA evaluations before it held confirmation hearings on the nominations in question.) In March 2009, however, the president of the ABA announced that the Obama Administration had reinstated the White House practice of seeking the ABA committee's evaluation of judicial candidates before making nomination decisions. American Bar Association, "Statement of H. Thomas Wells Jr. President, American Bar Association Re: The American Bar Association Standing Committee on the Federal Judiciary," news release, March 17, 2009, at http://www.abanet.org/scfedjud/wellsstatement.pdf. See also Tony Mauro and David Ingram, "White House Invites ABA Back into the Fold," *Legal Times*, vol. 32, March 23, 2009, p. 14.

- 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.[133] Upon completing its investigation, it informs the Administration whether, according to its rating system, it has found the candidate to be "Qualified," "Well Qualified," or "Not Qualified."[134]
- Judicial selection staff in the Administration might conduct a follow-up interview of the candidate (either in person or by telephone) to address any new questions or confirm new information arising out of the detailed vetting process.
- Administration staff evaluate the results of the detailed vetting effort and recommend to the President whether to nominate the candidate.

In the Administration of President Barack Obama, the various steps in the selection process are overseen by the White House counsel's office. It has been tasked to take the lead, through its own preliminary research and investigatory efforts, in identifying prospective circuit court candidates, whose names are then provided to Department of Justice staff (and later the FBI) to investigate more thoroughly. For district court candidates, the counsel's office reviews the recommendations of home state Senators (or of other home state officials when neither Senator is of the President's party).Where Senators have recommended more than one candidate for a district court vacancy, the counsel's office typically, based on its own preliminary review, has selected one of the candidates to be investigated more intensively by Department of Justice staff.[135] Also, as mentioned earlier, the responsibility for liaison with Senators regarding the lower court selection process continues to reside with the counsel's office, as it did during the Administration of President George W. Bush. 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.[136]

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.[137] A principal question

[133] As noted above, the Obama Administration in 2009 reinstituted the White House practice, discontinued by the previous Bush Administration, of informing the ABA committee of judicial candidates under consideration and seeking the committee's evaluation of these candidates before making nomination decisions. Bringing the ABA committee investigation back into the pre-nomination stage, one scholar noted, injected into that stage an "additional 30 to 45 days typically consumed" by an ABA committee investigation of a nominee. Russell Wheeler,"Judicial Nominations in the First 14 Months of the Obama and Bush Administrations," *Governance Studies at Brookings*, April 7, 2010, at http://www.brookings.edu/~/media/research/files/papers/2010/4/07%20judicial%20nominations%20wheeler/0407_judicial_nominations_wheeler.pdf.

[134] For an explanation of the standards and procedures used by the ABA Standing Committee on the Federal Judiciary in rating candidates for lower federal court judgeships, see the booklet *American Bar Association Standing Committee on the Federal Judiciary: What It Is and How It Works*, at http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf.

[135] Cassandra Butts, May 13, 2009, telephone conversation.

[136] Ibid.

[137] 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

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, and this, CRS has been told, was the initial practice of the Obama Administration in identifying district court candidates[138] (although subsequently the practice was relaxed, with one recommended name sometimes considered sufficient).[139] This practice affords 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.[140]

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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.

[138] After reviewing the backgrounds of the three candidates, Administration staff select one to undergo a more detailed vetting process. Cassandra Butts, May 13, 2009, telephone conversation.

[139] Jonathan Kravis, April 9, 2010 statement. See footnote 86.

[140] 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 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

Another 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?

If the vacancy to be filled is that of a district court judgeship, 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). For circuit court nominations, by contrast, the usual practice of the Clinton and George W. Bush presidencies, in keeping with long-standing custom, was to center consideration on candidates whom the Administration selected on its own, rather than on persons recommended by home state Senators. Similarly, President Obama, in the words of an Administration source, "retains the prerogative" to select circuit court nominees on his own,[141] although, it also has been emphasized, "home-state Senators are consulted in the circuit court candidate selection process."[142]

An administration, however, sometimes might be amenable to departing from customary 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.[143] Further, even if afforded

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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-August 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 was to require that home state Senators recommending candidates for district judgeships provide "multiple names." November 21, 2003, telephone interview with attorney Sheila Joy, Office of Legal Policy, Department of Justice.

[141] Cassandra Butts, May 13, 2009, telephone conversation.

[142] Jonathan Kravis, April 9, 2010, statement.

[143] For example, in 2008, the last full year of George W. Bush's presidency, his Administration, on at least four occasions, relinquished to home state Senators the selection of persons for the President to nominate to circuit court judgeships. This, as noted earlier, occurred when the President, in three instances, withdrew circuit court nominations

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.[144]

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.

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opposed by home state Senators in favor of new nominees recommended by the Senators and, in a fourth instance, when the President made an initial selection of a circuit court nominee from among a list of persons recommended jointly by the Senators of the nominee's state. In 2009, early in the Administration of President Barack Obama, home state Senators indicated, in two instances, that it was they who had recommended persons selected by the President to be circuit court nominees. See Sen. Evan Bayh, "Bayh Supports Nomination of Judge [David] Hamilton for Seventh Circuit," news release, March 17, 2009, at http://www.bayh.senate.gov/news/press/release/, in which Sen. Bayh stated, "I was proud to work with Senator [Richard G.] Lugar to recommend Judge Hamilton for this lifetime appointment"; and Sen. Barbara A. Mikulski, "Mikulski, Cardin Applaud Nomination of Judge Andre M. Davis to Court of Appeals for the Fourth Circuit," news release, April 2, 2009, at http://www.mikulski.senate.gov/Newsroom/PressReleases/, in which Sen. Mikulski stated, "I was proud to suggest Judge Davis to the President."

[144] The Administration of President George W. Bush asserted on various occasions that it was 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 one or more of 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 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 ones in effect during the 109th, 110th, 111th, and 112th Congresses, has been to afford that basic veto power to the home state Senator.[145] 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 four most recent Congresses, 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 automatically to 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.[146]

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 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.

[145] See footnote 36.

[146] See, for example, table entitled "Senate Judiciary Committee Blue-Slip Policy by Committee Chairman (1956-2003)," in CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger, 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.

Another tactical option for the Senator will be to try to persuade one or more members of the Judiciary Committee to engage in dilatory tactics in committee—in an effort to dissuade the committee from voting on the nomination.[147] 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."[148] 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."[149] 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."[150]

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 disposing of 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[151] and that the Senator placing the hold might be prepared to filibuster the nomination.[152] To end delay on the nomination and allow for 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.[153]

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[147] 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.

[148] U.S. Congress, Senate Committee on the Judiciary, *Rules of Procedure*, at http://judiciary.senate.gov/about/committee-rules.cfm.

[149] 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.

[150] 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.

[151] The Senator initially may place the hold with the party leader anonymously. However, if, in response to a unanimous consent request, the party leader or the leader's designee objects explicitly on behalf of the Senator, the leader, under Senate procedures, would apparently identify the Senator. For 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*, by Walter J. Oleszek; also, CRS Report R42928, *"First Day" Proceedings and Procedural Change in the Senate*, by Valerie Heitshusen (in particular, discussion of Senate passage, at start of the 112th Congress, of S.Res. 28 and of the resolution's continued application across Congresses).

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

[153] 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"); also, CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard

As long as the Senate majority leader honors the hold placed by the home state Senator, the nomination will not receive floor consideration.[154] (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, the longstanding Senate rule has been to allow a maximum of 30 hours of additional post-cloture debate on the nomination. After 30 hours, unless less time were used, the Senate would vote on whether to confirm. At the start of the 113th Congress, however, the Senate approved a temporary standing order, in effect until the end of the Congress, that subjects district, but not circuit, court nominations to a maximum of two hours of post-cloture Senate consideration.[155]

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. 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 expressed by 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 preferable to 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 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

S. Beth and Betsy Palmer.

[154] "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*, by Walter J. Oleszek.

[155] The standing order was included in Section 2 of S.Res. 15 approved by the Senate on January 24, 2013, by a vote of 78-16. See "Amending the Standing Rules and Procedures of the Senate," *Congressional Record*, daily edition, vol. 159, January 24, 2013, pp. S270-S272.

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.

Another 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.

Recent 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.[156] Specifically, these letters expressed the expectation that the Administration engage in consultation with home state Senators of both parties that is "in good faith" and "serious." 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

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

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.[157]

Subsequently, on numerous occasions during the 110th Congress, Senator Leahy, chairman of the Judiciary Committee, called on the Bush Administration to "work with" home state Senators—including Senators of the opposition party—in the judicial selection process. Such consultation, Senator Leahy maintained, would help identify judicial candidates acceptable to both the Administration and the Senators and, conversely, avoid the selection of more controversial nominees to whom the Senators would object.[158]

During the 111th Congress, Chairman Leahy in various Senate floor statements praised President Barack Obama for consulting with home state Senators prior to selecting lower court nominees. In December 2009 floor remarks, he cited pending judicial nominations that had the support of Republican home state Senators in seven different states. "These nominations," Senator Leahy said, were "just the most recent examples of this President reaching out to home state Senators from both parties to consult before making nominations."[159] More recently, in a March 2012 teleconference with journalists, President Obama's White House counsel stressed the importance the President attached to consulting with home state Senators. President Obama, she asserted, "has followed the historical practice of consulting with Senators of both parties and nominating highly qualified non-controversial district court nominees…. " It was, she added, "always the White House's goal to nominate a candidate for each and every district that will be supported by the home state Senators."[160]

Recent Controversies over Administrations' Consultation with Senators

During the presidencies of William J. Clinton, George W. Bush, and Barack Obama, Senators, usually of the opposition party, sometimes questioned the adequacy of Administration consultation with home state Senators in the lower court selection process. In various instances, Senators, maintaining they were not adequately consulted, or not consulted in good faith, concerning lower court nominations in their states, declined to return positive blue slips to the Senate Judiciary Committee, in effect blocking committee consideration of the nominations.

[157] Alberto R. Gonzales, counsel to the President, letter to Sen. Patrick J. Leahy and other Democratic members of Senate Judiciary Committee, May 2, 2001. (Copy available from author to congressional clients upon request.) 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."

[158] See, for instance, the opening statements of Sen. Leahy at committee hearings held on judicial nominations on July 19, 2007, at http://www.leahy.senate.gov/press/200707/071907c.htm, and on December 18, 2007, at http://www.leahy.senate.gov/press/200712/121907f.html, 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.

[159] Sen. Patrick J. Leahy, "Judicial and Executive Nominations," remarks in the Senate, *Congressional Record*, daily edition, vol. 155, December 23, 2009, p. S13867.

[160] "Kathryn Ruemmler, White House Counsel, Holds a Teleconference on Judicial Nominees," *Political Transcript Wire*, March 14, 2012, at http://www.nexis.com.

During the Clinton Presidency

In 1997, during the Clinton presidency, 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.[161]

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."[162]

During the Bush Presidency

During the presidency of George W. Bush, Senators, mostly along party lines, periodically debated whether the Administration adequately consulted with home state Senators before President Bush selected his nominees. Democratic leaders in the Senate asserted that the Bush Administration frequently had 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, made unwise, controversial nominations, provoking Democratic opposition in the Senate.[163] Senate Republicans, by contrast, 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.[164]

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[161] Sen. Orrin G. Hatch, "Statement of Sen. Orrin Hatch," news release, April 17, 1997. (Copy available from author to congressional clients upon request.)

[162] 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.

[163] 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 to congressional clients upon request.) 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.)

[164] 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.

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.[165] In the Senate, however, in the face of significant opposition from Democratic Members, none of the five nominees received final confirmation votes[166] (although three were subsequently confirmed, during the 109th Congress).[167] 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,[168] but defended by Senate Republicans,[169] 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

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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, February 12, 2003, p. 3544.

[165] Available on the website of the U.S. Department of Justice's Office of Legal Policy are archived 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 subsequent Congresses.) See http://www.justice.gov/archive/olp/blueslips1107.htm and http://www.justice.gov/archive/olp/judicialnominations108.htm. During the 108th Congress, the archived lists show, "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 judgment"). 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 and Maureen Bearden.

[166] In the case of four of the nominations, motions were made by Senate Republicans to limit the time for considering the nominations, but these motions proved unsuccessful. The Senate (as discussed above) can impose limits on consideration by invoking cloture, 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 invoke cloture, including the nominations of Carolyn B. Kuhl, Richard A. Griffin, David W. McKeague, and Henry S. Saad. The number of votes cast to invoke cloture 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*; also, CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer.

[167] 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.*

[168] See, for example, Sen. Debbie Stabenow, "Judicial Nominees," remarks in the Senate, *Congressional Record*, vol. 149, July 16, 2003, p. 18212.

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

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.[170] 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.[171]

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.[172] As a result of this agreement, some, but not all, of the President's most controversial circuit court nominations, which previously had been blocked on the Senate floor, were confirmed.[173]

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.[174]

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 was not the majority party in the 110th Congress. In the Judiciary Committee during the 107th Congress, five lower court nominees

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[170] 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.

[171] 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.

[172] 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 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'").

[173] 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*, January 10, 2007, p. A12.

[174] 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.

opposed by home state Senators were among a larger number whose nominations did not advance to the committee hearing stage.[175] Likewise, under the blue slip policy in effect in the 110th Congress, the Judiciary Committee did not consider or act on a judicial nomination in cases where a home state Senator declined to return a positive blue slip.[176] Further, the chairman of the Judiciary Committee, on various occasions, criticized President Bush for failing to "work with" Senators of several specified states in making judicial nominee selections for those states[177] and for selecting nominees who had not received support from their home state Senators in the form of positive blue slips.[178]

In another instance during the 110th Congress, the President 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,[179] 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.[180] Eventually, the nominee, citing "press

[175] 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. 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, November 11, 2005, p. 8.

[176] See "Senators Can Veto Judicial Picks," *Grand Rapids Press*, January 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 Judicial Battles Loom, Leahy Revives Senate 'Blue Slip' Tradition," *CQ Today*, January 3, 2007, at http://www.cq.com.

[177] See footnote 158.

[178] 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, November 5, 2007, pp. 3315-3316. (Hereafter cited as Perine, "No Easing of Bush's Stance.")

[179] 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*, September 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, September 6, 2007, at http://www.webb.senate.gov.

[180] 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," R*ichmond Times Dispatch*, September 13, 2007, p. B2.

reports" that he was unlikely to receive a hearing before the Judiciary Committee, requested that President Bush withdraw his nomination.[181] Ultimately, over the course of the 110th Congress, lack of home state Senator support blocked at least six circuit court nominations and three district nominations from being considered by the Judiciary Committee. In each instance, the nominations lacked positive blue slips from both home state Senators, which were regarded by the committee's chairman as necessary for the nominations to move forward in committee.[182]

During the Obama Presidency

Most recently, early in the Obama presidency, the Senate's Republican minority in the 111th Congress underscored the importance of being consulted by the Administration, prior to nomination, about persons under consideration for lower court appointments in their states. In a March 2, 2009, letter to President Barack Obama, signed by all 41 of its Members, the Senate's Republican Conference cited "the principle of senatorial consultation," which they said "allows individual senators to provide valuable insights into their constituents' qualifications for federal service." They then added,

> We hope your Administration will consult with us as it considers possible nominations to the federal courts from our states. Regretfully, if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.[183]

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[181] Manu Raju, "Judicial Nominee Withdraws amid Democratic Criticism," *TheHill.com*, January 18, 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.

[182] Four of the nine nominations were withdrawn by the President during the Congress, and the other five were returned to the President at the end of the Congress. The four withdrawn nominations (one district, three circuit) were of Mary O. Donohue of New York to the Northern District of New York (withdrawn on September 6, 2007), E. Duncan Getchell Jr. of Virginia to the Fourth Circuit (withdrawn on January 23, 2008), Stephen J. Murphy III of Michigan to the Sixth Circuit (withdrawn on April 15, 2008), and Gene E.K. Pratter of Pennsylvania to the Third Circuit (withdrawn on July 24, 2008). The five returned nominations (two district, three circuit—all returned on January 2, 2009) were of James E. Rogan of California to the Central District of California, Lincoln D. Almond of Rhode Island to the District of Rhode Island, Rod J. Rosenstein of Maryland to the Fourth Circuit, Shalom D. Stone of New Jersey to the Third Circuit, and William E. Smith of Rhode Island to the First Circuit. For the dates on which these and all other district and circuit court nominations during the 110th Congress were received in the Senate, as well as the dates of their final disposition, see Tables 1 and 2 (for circuit court nominations and district court nominations, respectively) in CRS Report RL33953, *Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress*.

For news accounts of lack of home state Senator support for the above-noted circuit court nominations, see Perine, "No Easing of Bush's Stance"; John E. Mulligan, "Whitehouse Discounts Value of Court Nominee's Hearing," *The Providence Journal*, December 17, 2007, at http://www.projo.com; Pedro Ruz Gutierrez and Carrie Levine, "Stalemate over Judicial Nominations Dampens Bush Legacy," *Legal Times*, March 14, 2008, at http://www.law.com; and Shannon P. Duffy, "Sources: Senators Agree on New Federal Judges Package," *Law.com*, July 2, 2008, at http://www.law.com.

For news accounts of lack of home state Senator support for the above-noted district court nominations, 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], September 7, 2007, p. A3; Erica Werner, "Boxer Blocking Former Rep. Rogan Nomination to Federal Judiciary," *Associated Press*, November 30, 2007, at http://www.lexisnexis.com; David G. Savage, "Rogan May Be Denied Seat on Federal Bench," *Los Angeles Times*, December 4, 2007, p. A14; and Kathy Mulvaney, "Five Seeking Seats on Federal Courts," *Providence Journal-Bulletin*, February 12, 2009, at http://www.lexisnexis.com.

[183] Senate Republican Conference, letter to President Barack H. Obama, March 2, 2009. (Hereafter cited as Senate Republican Conference, March 2, 2009, letter.) (Copy available from author to congressional clients upon request.) See also "Republican Senators Insist on Role in Judicial Picks," *National Journal's CongressDaily*, March 3, 2009, and

Also in their letter, the Republican Senators suggested to President Obama that, as a show of bipartisanship, he re-nominate some of President Bush's circuit court nominees who failed to be confirmed in the 110th Congress.[184] At that point, President Obama had yet to make any circuit or district court nominations.

Two weeks later, in possible reaction to the Republican Conference letter, the Obama Administration stated an intention to seek out the views of Republican home state Senators before selecting judicial nominees. The statement, by an unnamed Administration official, came on March 17, 2009, coinciding with President Obama's first lower court nomination. The President that day selected Chief Judge David Hamilton of the U.S. District Court for the Southern District of Indiana to serve on the U.S. Court of Appeals for the Seventh Circuit. Press reports of the nomination drew attention to the fact that it was supported by Indiana's two Senators, one a Democrat and the other a Republican, and that both, in consultation with the Obama Administration beforehand, had recommended Judge Hamilton for the circuit judgeship.[185] The official also reportedly stated that the Obama Administration was "eager to put the confirmation wars behind us—to turn the page and work with senators from both sides of the aisle to achieve at least a bipartisan process."[186] Subsequently, during the remainder of the 111th Congress, little, if any, public controversy arose over the adequacy of the Obama Administration's consultation with Senators concerning judicial nominations in their states.

Early in the 112th Congress, however, the adequacy of such consultation did become an issue for home state Senators in two states. In January 2011, a newly elected Senator not of the President's party faulted President Obama for failing to consult him before re-nominating two persons to federal judgeships in his state.[187] (Subsequently, the Senator wrote, in a newspaper op-ed piece,

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Manu Raju, "Republicans Warn Obama on Judges," *Politico.com*, March 2, 2009, both at http://www.lexisnexis.com.

[184] The Senators noted that in the beginning of his Administration, George W. Bush had nominated to the circuit courts two of President Clinton's previous judicial nominations. "It would help change the tone in Washington," their letter said, "if your Administration would take the same bipartisan step." Senate Republican Conference, March 2, 2009, letter. During the first two years of the Obama presidency (coinciding with the 111th Congress), none of the unconfirmed judicial nominees of George W. Bush was re-nominated by President Obama. However, one such nominee was re-nominated by President Obama, and confirmed by the Senate, in the 112th Congress. See chronology of actions during 110th and 112th Congresses on nominations of John J. Tharp, Jr. of Illinois to be United States District Judge for the Northern District of Illinois, in Legislative Information System's Nominations database, at http://www.congress.gov/nomis.

[185] For example, one account reported that the Hamilton nomination "makes good on Mr. Obama's campaign pledge for home-state consultation, and the support of Indiana's senators—Richard G. Lugar, a Republican, and Evan Bayh, a Democrat—both of whom recommended Judge Hamilton for the post." Christina Bellantoni and Stephen Dinan, "Obama Names First Court Pick," *The Washington Times*, March 18, 2009, p. A8. (Hereafter cited as Bellantoni and Dinan, "Obama Names.")

[186] Josh Gerstein, "Bipartisan Aim for Judge Picks—For Now," *Politico.com*, March 17, 2009, at http://www.lexisnexis.com. (Hereafter cited as Gerstein, "Bipartisan Aim.") The official, another story reported, said that the White House "is consulting with Republicans—members of the Judiciary Committee and home-state senators—on future judicial nominations." Bellantoni and Dinan, "Obama Names," p. A8. See also Michael A. Fletcher, "Obama Names Judge to Appeals Court," *The Washington Post*, March 18, 2009, p. A4, reporting that "the White House said it would sound out Senate Republicans on judicial appointments in an effort to 'put the confirmation wars behind us.'"

[187] On January 5, 2011, President Obama re-nominated Victoria F. Nourse of Wisconsin to the U.S. Circuit Court of Appeals for the Seventh Circuit and Louis B. Butler Jr. to the U.S. District Court for the Western District of Wisconsin. Earlier nominations of Nourse and Butler in the 111th Congress had not received Senate confirmation and were returned to the President at that Congress's final adjournment. Although the Obama Administration had consulted with, and accepted the recommendations of Wisconsin's two Democratic Senators before nominating Nourse and Butler in the 111th Congress, it reportedly did not consult with the state's newly elected Republican Senator before the President re-nominated Nourse and Butler at the start of the 112th Congress. The new Senator, two days after the re-nominations by

that the Obama White House "chose not to contact me until May 10—months after sending the nominations to the Senate.")[188] In early February 2011, another Senator, also not of the President's party, stated he was "deeply disappointed in the White House's lack of consultation" with him on a nomination to a home state district court judgeship.[189] In both states, opposition by these Senators to the above nominations blocked their consideration in the Judiciary Committee, preventing their confirmation. All three nominations ultimately were returned to President Obama on January 3, 2012, at the end of the first session of the 112th Congress.

Eventually, in one of the states, the consultation issue was resolved, when President Obama, on February 29, 2012, after White House consultation with the state's two opposition party Senators, selected a district court nominee acceptable to both.[190] The Judiciary Committee favorably reported this nomination on June 7, 2012, and the Senate confirmed it by a unanimous 95-0 roll call vote on December 11, 2012.[191]

In the other state, however, consultation-related issues persisted. Over the course of the 112th Congress, a working consultative arrangement was not reached by the White House and the state's new Senator (whom the President had bypassed when making his two judicial re-nominations in January 2011). Impeding such an arrangement was a disagreement between the Senator and the state's senior Senator over the number of members each should select for a state judicial candidate screening commission.[192] Amid these difficulties, the President in 2012 did not submit new nominations to take the place of the earlier unsuccessful ones.

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:

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the President, criticized the Administration for not following "the standard procedure in the judicial nomination process" of extending "the courtesy of consulting the home state Senators before nominating an individual to the courts." It was "unfortunately in this case," he continued, "that the voters of Wisconsin who expressed their wishes on November 2nd, were completely ignored." Excerpts from statement attributed to Senator Ron Johnson, in Craig Gilbert, "Sen. Ron Johnson Opposes White House over Butler, Nourse Judicial Nominations," January 7, 2012, [Milwaukee] *Journal Interactive,* at http://www.jsonline.com/blogs/news/113095334.html.

[188] Sen. Ron Johnson, "These Nominees Aren't Qualified," [Milwaukee] *Journal Interactive,* July 30, 2011, at http://www.jsonline.com/news/opinion/126428808.html.

[189] Sen. Tom Coburn, "Dr. Coburn's Statement on the Nomination of Arvo Mikkanen to U.S. District Court for the Northern District of Oklahoma," news release, February 2, 2011, at http://www.coburn.senate.gov.

[190] See testimony of Oklahoma Senators Tom Coburn and James M. Inhofe on behalf of U.S. district court nominee John E. Dowdell at May 9, 2012, hearing of the Senate Judiciary Committee on judicial nominations, at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8c79807be82cedcc9bfb5daa379c701a.

[191] See chronology of actions taken by Senate Judiciary Committee and full Senate on the nomination of John E. Dowdell to be United States District Court Judge for the Northern District of Oklahoma, in Legislative Information System's Nominations database, at http://www.congress.gov/nomis.

[192] Specifically at issue was whether the senior Senator, by virtue of being of the President's party, should select a greater number of the commission's members than the junior Senator, who was not of the President's party—or whether they should select the same number of members. See "Judicial Appointments Remain in Limbo as Johnson, Kohl, Disagree on Make Up of Nominating Commission," *DC Wrap,* November 3, 2011, at http://www.wispolitics.com.

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.

During the 111th Congress, little or no public controversy arose between the Obama Administration and opposition party Senators over what constitutes good faith consultation. Upon the announcement of President Obama's first circuit court nomination, an official said it was "trying to set a tone" and "to send a message that we're going to spend time consulting in the Senate. We are eager to put the confirmation wars behind us."[193] The implication, it can be argued, was that, in order to put "the confirmation wars behind," the Administration would, for its part, enter into consultations with home state Senators with what it considered to be good faith. Arguably in a similar tone, the Senate Republican Conference, in a letter to the President two weeks earlier, had noted that the judicial appointment process had "become needlessly acrimonious," and added, "We would very much like to improve this process, and we know you would as well."[194]

Early in the 112th Congress, however, judicial nomination controversies arose in two states over an alleged lack of White House consultation with home state Senators. The issues raised in the two states, involving whether, or to what extent, an Administration should consult with home state Senators before a judicial nomination is selected, are discussed below, in the immediately following section.

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 stated practice of the Administration of George W. Bush was one of welcoming home state Senators' views about who should or should not be nominated to fill federal court judgeships in their states.[195] The Administration, however, appeared not always to have informed home state Senators, prior to announcing the selection of a nominee, of all

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[193] Margaret Talev and Marisa Taylor, "Obama Judicial Pick Will Test Pledge to End Confirmation Wars," *McClatchy Newspapers*, March 17, 2009, at http://www.lexisnexis.com.

[194] Senate Republican Conference, March 2, 2009, letter.

[195] 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.

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.[196]

As discussed earlier, the stated practice of the current Obama Administration is to consult with home state Senators concerning circuit and district court candidates under consideration, well before a nominee is selected. Particularly for district court candidates, this consultation entails seeking recommendations from home state Senators of the President's party (or, if neither Senator is of the President's party, from other state officials of the President's party); hence, these Senators, by virtue of their recommending role, provide the Administration with opinions—in effect, endorsements—of candidates well before the selection of a nominee.[197] Opposition party Senators, according to an Administration source, also are "afforded the opportunity to comment on circuit and district court candidates in their state prior to nomination."[198]

In spite of the Obama Administration's stated practice, judicial nomination controversies arose in two states early in the 112th Congress over lack of prior White House consultation with home state Senators. In one state, as discussed above,[199] the Obama White House had previously, during the 111th Congress, consulted with the state's two Democratic Senators over a district court nominee and a circuit court nominee, both of which, however, failed to be confirmed in that Congress. At the start of the 112th Congress, when the President re-nominated the two judicial nominees, the White House's previous consultations with Senators appeared to be treated by the Administration as all that were required, rendering unnecessary prior consultation with a newly elected Republican Senator in that state about the presidential decision to re-nominate. From the Senator's standpoint, however, the re-nominations submitted to the Senate in the 112th Congress were new nominations, about which the state's newly elected Senator should have been consulted beforehand. The Senator noted that while the President announced the two re-nominations at the start of the Congress, on January 5, 2011, the Senator was not contacted about them by the White House until May 10, 2011.[200]

Early in the 112th Congress, another judicial nomination controversy, also discussed above,[201] arose over a reported lack of White House consultation with home state Senators prior to the nomination being made. In this instance, the state's two Republican Senators, according to one newspaper story, "complained that they weren't consulted by the White House" about a nomination to a district court judgeship in their state "before it was forwarded to the Senate."[202]

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

[197] Cassandra Butts, May 13, 2009, telephone conversation.

[198] Jonathan Kravis, April 9, 2010, statement.

[199] See preceding discussion, under "During the Obama Presidency," of the controversy arising over President Obama's re-nominations of Victoria F. Nourse of Wisconsin to the U.S. Circuit Court of Appeals for the Seventh Circuit and Louis B. Butler Jr., to the U.S. District Court for the Western District of Wisconsin.

[200] Sen. Ron Johnson, "These Nominees Aren't Qualified," [Milwaukee] *Journal Interactive*, July 30, 2011, at http://www.jsonline.com/news/opinion/126428808.html.

[201] See preceding discussion, under "During the Obama Presidency," of the controversy arising over President Obama's nomination in February 2011 of Arvo Mikkanen to the U.S. District Court for the Northern District of Oklahoma.

[202] Chris Casteel, "Judicial Nominee Praised, Except by Oklahoma's Senators," *The Oklahoman*, February 2011, p. 1A,

This particular controversy was acknowledged several months later, in September 2011, by a senior White House counsel to President Obama. In a *National Law Journal* interview, the counsel stated that he thought the two Senators "had been consulted, but perhaps we hadn't closed that loop before nomination. That really is the exception."[203]

Both of the above controversies ultimately ended with the judicial nominations in question being returned to the President and not being confirmed. A key factor in the failure of the nominations to move forward in the judicial confirmation process was opposition to them by home state Senators. The opposition, in turn, was based in part, on senatorial concern with not being consulted by the White House prior to the President making a nomination. The episodes in both states underscored that an Administration's declining to consult beforehand with home state Senators regarding selection of judicial nominees is very much the exception to the rule. The episodes as well underscored the typical importance of such consultation to securing home state Senator support for the nominees.

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 is 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.

Many Presidents, however, have selected some lower court nominees from among candidates recommended by opposition party Senators. An 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.

Early in the Obama presidency, as discussed earlier, a White House official reportedly said the Administration would seek out the views of opposition party Senators before selecting judicial nominees from their states. One news story quoted the Administration official as saying it was "eager to put the confirmation wars behind us—to turn the page and work with senators from

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at http://www.nexis.com. See also Sen. Tom Coburn, "Dr. Coburn's Statement on the Nomination of Arvo Mikkanen to U.S. District Court for the Northern District of Oklahoma," news release, February 2, 2011, at http://www.coburn.senate.gov (in which Senator Coburn stated that he was "deeply disappointed in the White House's lack of consultation with me on this nomination."); and Jim Myers, "Coburn, Inhofe Call for Withdrawal of Judicial Nomination," *Tulsa World*, February 18, 2011, at http://www.tulsaworld.com (reporting, in part, that Senator James M. Inhofe "was critical of the way the White House handled the nomination and said it did not follow the traditional process.").

[203] David Ingram, "Selective Service: Christopher Kang Takes Charge of Obama's Judicial Nomination Process," *National Law Journal*, vol. 34, September 26, 2011, p. 10.

both sides of the aisle to achieve at least a bipartisan process."[204] For its part, the Senate Republican Conference, it will be recalled, has said its Members "will be unable to support moving forward" on judicial nominees from their states "if we are not consulted on, and approve of," the nominees.[205]

Each presidential administration, as it considers judicial candidates from states with one or two opposition party Senators, likely will address a variety of questions about the kind of consultative relationship it wants with the Senators. Should, for example, consultation generally be limited to seeking the Senators' views of candidates recommended from other sources? Or should the consultative role for these Senators be greater—to include, for instance, an opportunity for them, early in the nominee selection process, to recommend specific candidates or to inform the Administration of the types of criteria that they believe should be used in selecting nominees? When both home state Senators are of the opposition party, should the Administration, under some circumstances, select a judicial nominee from among candidates recommended by the Senators, rather than from other sources?

When federal court vacancies arise in their states, opposition party Senators might often be inclined to seek as large a consultative role in the judicial nominee selection process as possible—in some cases perhaps approaching or equal to the role traditionally played by Senators of the President's party. An administration, however, might generally be expected to resist the notion that the consultative role for opposition party Senators in judicial selection is on a par with the role played by Senators of the President's party. When neither of a state's Senators is of the President's party, an administration might prefer to generate its own list of candidates for judicial candidates. Or it might be concerned with respecting the traditional claims of state officials of the President's party, who predictably will assert that their prerogatives to recommend candidates for judicial appointments supersede those of opposition party Senators. How an administration, in judicial selection, resolves the competing claims of opposition party Senators with those of state officials of the President's party might vary, depending, among other things, on the state and the extent to which the Administration believes it must make special accommodations with the Senators in question.

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

As already discussed,[206] 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 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

[204] Gerstein, "Bipartisan Aim."

[205] See earlier discussion, under the heading "During the Obama Presidency," of the Senate Republican Conference's March 2, 2009, letter to President Obama.

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

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 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."[207]

Controversy also arose 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 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 alleged, selected nominees without regard to the Senators' nominee preferences or concerns.[208]

During the first two years of the Obama presidency, the prerogatives of home state Senators in recommending candidates for circuit court judgeships had not yet become an issue. An Administration source in April 2010 noted that of 18 persons nominated up to then by President Obama for circuit judgeships, at least 6 were initially recommended for the President's consideration by home state Senators.[209] At the same time, as discussed earlier, the position of President Obama, in the words of an Administration source, was that he "retains the prerogative" to select circuit court nominees on his own, distinct from persons whom home state Senators might recommend.[210]

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[207] 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.

[208] The Bush Administration never publicly stated, as a matter of general policy, what it regarded 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 had chosen 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 judicial philosophy that is compatible with his own. From the President's standpoint, opposition party Senators, particularly if they have 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.

[209] Jonathan Kravis, April 9, 2010, statement.

[210] Cassandra Butts, May 13, 2009, telephone conversation.

During the next two years of the Obama presidency, however, circuit court nominees selected without the prior approval of Republican home state Senators sometimes proved, upon their nomination, to be unacceptable to the Senators. Lacking home state Senator support, the circuit court nominations in question were blocked, under the Senate Judiciary Committee's current blue slip policy, from receiving either a Judiciary Committee hearing or a committee vote—and thus from moving forward in the confirmation process.[211]

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

Throughout the presidency of George W. Bush, the Judiciary Committee's blue slip policy often was at the center of Senate debate over judicial nominations. In this debate, Senators differed on how much control over lower court nominations the policy should confer on a home state Senator—and, specifically, on whether a Senator's failure to return a favorable blue slip for a district or circuit court nomination should block the Judiciary Committee from considering the nomination. This issue was particularly relevant in the 110th Congress, when six of President Bush's circuit court nominations and three of his district court nominations lacking positive blue slips from both home state Senators failed to receive hearings or votes by the Senate Judiciary committee.[212]

Thus far during the presidency of Barack Obama, the Judiciary Committee's blue slip policy per se has not been the subject of debate. However, the committee's chair has sometimes raised concerns, in connection with his blue slip policy, about judicial nominations not moving forward in committee—specifically when home state Senators not of the President's party have not returned blue slips.

In early 2009, at the start of the 111th Congress, the Judiciary Committee's blue slip policy was explicitly acknowledged on both sides of the aisle in the Senate as central to determining whether a judicial nomination lacking the support of both home state Senators should receive committee consideration. With the White House newly occupied by a Democrat, the Senate Republican Conference urged that the blue slip policy continue to be applied as it had been in the previous Congress, when the President was a Republican.[213] Under that policy, as discussed above, the absence of a favorable blue slip from a home state Senator prevented a lower court nomination from receiving a committee hearing or other committee action.

During the 111th Congress, the power to decide how the blue slip policy was applied rested, as it had during the previous Congress, with Senator Leahy, the committee's chair. In September 2010 floor remarks, Senator Leahy indicated that support of both home state Senators, regardless of

[211] See, for example, Daniel Malloy, "Court Vacancies: More Judges Not in Sight," *The Atlanta Journal-Constitution*, June 15, 2012, at http://www.nexis.com, Alyson M. Palmer, "Could Vacant 11th Circuit Seat Allow Compromise, *Daily Report*, May 22, 2012, at http://www.dailyreportonline.com (discussing the reported opposition of Georgia's two Senators to a nominee for the U.S. Court of Appeals for the 11th Circuit); "At Kansas Senators' Request, Committee Will Not Consider Steve Six's Nomination to the U.S. Court of Appeals," *LSWorld.com*, July 28, 2011, at http://www2.ljworld.com; and Craig Gilbert, "Sen. Ron Johnson Opposes White House over Butler, Nourse Judicial Nominations," January 7, 2012, [Milwaukee] *Journal Interactive*, at http://www.jsonline.com/blogs/news/113095334.html.

[212] These were the nine nominations discussed earlier in footnote 182.

[213] In a letter to the President Obama concerning the judicial appointment process, Republican Senators stated their opposition to changing the Judiciary Committee's "practice of observing senatorial courtesy," adding "we, as a Conference, expect it to be observed, even-handedly and regardless of party affiliation." Senate Republican Conference, March 2, 2009, letter.

their party, was a prerequisite for a lower court nomination to be considered by the Judiciary Committee. In those remarks, Senator Leahy praised President Obama, in selecting judicial nominees, for having "worked with home State Senators in both parties." Likewise, he said, "I have respected the minority. I have not brought up people who did not have the support of their Republican home State Senators."[214] Subsequently, during the 112th Congress, at a March 2011 hearing on judicial nominations, Senator Leahy spoke more expansively about his blue slip policy:

> I will continue to do as I have always done and respect the customary deference given to home state Senators by waiting to proceed on nominations from their states until both Senators have returned blue slips. This is meant to ensure that the home state Senators who know the needs of the courts in their state best are consulted and have the opportunity to make sure that the nominees are qualified. As Chairman, unlike certain of my Republican predecessors, I have not proceeded to hold a hearing on a single nominee without both blue slips having been returned.[215]

At the same hearing, however, Senator Leahy expressed concerns about his blue slip policy possibly being "abused"—specifically, if home state Senators were taking advantage of that policy to block committee consideration of qualified judicial nominees. Senator Leahy noted that, "without blue slips having been returned" from several Senators of the opposite party, the Judiciary Committee was unable, at that hearing, to include "several nominees who [were] otherwise ready for hearings." Noting that it was his policy not to hold a hearing on a judicial nominee without both home state Senators first returning blue slips, Senator Leahy said he hoped, "in return, that fairness is not abused simply to delay our ability to make progress filling vacancies."[216]

Should the Judiciary Committee and the Senate, as a Matter of Courtesy to Colleagues, Approve Judicial Nominees Supported by Home State Senators?

In recent Congresses, Senate supporters of judicial nominations that have encountered difficulties either in committee or on the Senate floor, in making a case in favor of confirmation, often have pointed, among other things, to the fact that the nominations enjoyed home state Senator support. Sometimes, they also have suggested that the Judiciary Committee and the Senate should consider and approve the nominations, as a courtesy or in deference to their colleagues, the home state Senators.

In the 110th Congress, for instance, Senate Republicans, then in the minority, drew attention to the fact that three of President George W. Bush's circuit court nominations (all nominated to the Fourth Circuit) had not received consideration by the Judiciary Committee, despite having, in each case, the support of both home state Senators.[217] (Ultimately, at the end of the Congress, the

[214] Sen. Patrick J. Leahy, "Nomination of Jane Branstetter Stranch to be United States Circuit Judge for the Sixth Circuit," remarks in the Senate, *Congressional Record*, daily edition, vol. 156, September 13, 2010, p. S7009.

[215] March 16, 2011, testimony of Sen. Patrick J. Leahy, in U.S. Congress., Senate Committee on the Judiciary, *Confirmation Hearings on Federal Appointments*, 112th Cong., 1st sess., February 2 and 16, and March 16, 2012, S, Hrg.112-72, Pt. 1 (Washington, DC: GPO, 2011), p. 1411.

[216] Ibid. A year later, Senator Leahy again cited the non-return of blue slips as preventing judicial nominations from moving forward in the Judiciary Committee. During floor debate on judicial nominations, Senator Leahy said there were "seven nominations on which the Senate Judiciary Committee cannot proceed" because home state Senators of the other party had not returned blue slips. Sen. Patrick J. Leahy, "Executive Session," remarks in the Senate, *Congressional Record*, daily edition, vol. 158, April 26, 2012, p. S2759.

[217] The circuit court nominations in question were those of Glen E. Conrad of Virginia, Robert J. Conrad Jr. of North Carolina, and Steve A Matthews of North Carolina. For remarks of the Senate Republican Leader discussing both

three nominations were returned to the President, without having received hearings.) Senator Mitch McConnell of Kentucky, the Republican leader, and Senator Arlen Specter of Pennsylvania, ranking member on the Judiciary Committee, discussed two of these nominees in an April 2008 letter to the Senate majority leader and the chair of the Judiciary Committee. Both nominees, their letter said, were "ready for hearings," had "been waiting for many months," and "enjoyed strong home-state support from their Senate delegations," all of whom were Republican Members. Senators McConnell and Specter said the committee appeared "to view the support of Republican senators as a necessary, but insufficient, condition for their constituent nominees." They urged that the committee instead regard the support of the home state Senators in question to be as "dispositive" as the support given by a Democratic home state Senator to a judicial nominee.[218]

In the 111th Congress, the issue of deference again was raised—this time, however, not regarding how much deference the Judiciary Committee, but rather the Senate as a whole, should to give to home state Senator support of judicial nominations. The issue was particularly underscored during Senate floor debate on July 29, 2010, when Senate Democrats, in the majority (as they were in the previous Congress), made six different unanimous consent requests for the Senate to consider specific judicial nominations (involving 6 circuit and 14 district court nominees). [219]All of the unanimous consent requests were objected to by the ranking member on the Judiciary Committee, Senator Jeff Sessions.[220] In remarks preceding the requests, Senator Sheldon Whitehouse observed that four district court nominations included in the requests had been approved by the Judiciary Committee by party-line votes, and a fifth district court nomination, from the Senator's state of Rhode Island, had been reported out by a vote of 13-6 (with one Republican Senator joining the 12 Democrats voting to favorably report). All five district court nominees, Senator Whitehouse noted, had the support of both of their home state Senators. "Why," the Senator asked, "have we departed from the longstanding tradition of respect [for] the views of home State Senators who know the nominees best and who best understand their home districts?" Moments later, he urged "colleagues on the other side to reconsider what I think is a terrible mistake, which is to allow out-of-State special interests to prevail over the considered judgment of home State Senators when they agree on the best qualified nominee for district court in their home State."[221]

Conrad nominations, see Sen. Mitch McConnell, "Nominations," *Congressional Record*, daily edition, vol. 154, July 17, 2008, pp. S6909-S6910. For a letter by the Republican leader and the ranking member of the Judiciary Committee discussing the Robert Conrad and Matthews nominations, see "Judicial Confirmations," *Congressional Record*, daily edition, vol. 154, May 22, 2008, p. S4770.

[218] April 29, 2008, letter of Sens. Mitch McConnell and Arlen Specter to Sens. Harry Reid and Patrick J. Leahy, in "Judicial Confirmations," *Congressional Record*, daily edition, vol. 154, May 22, 2008, p. S4770.

[219] "Judicial Nominations," *Congressional Record*, daily edition, vol. 156, July 29, 2010, pp. S6476-S6486.

[220] Ibid., pp. S6484-S6486. At one point, however, while explaining his objections, Senator Sessions stated that "[c]ertain nominees are going to be moved forward." Ibid. p. S6485. This, in fact, occurred soon thereafter: On August 5, 2010, just before adjourning for a five-week summer recess, the Senate by unanimous consent confirmed one circuit court and three district court nominees, returned five relatively controversial judicial nominations to the President, allowed the remaining judicial nominations on the Senate's executive calendar to stay pending, in "status quo," over the recess, and scheduled the consideration of a circuit court nomination to be its first order of business upon reconvening on September 13, 2010. See *Congressional Record*, daily edition, vol. 156, August 5, 2010, p. S6971.

[221] Sen. Sheldon Whitehouse, "Judicial Nominations," remarks in the Senate, *Congressional Record*, daily edition, vol. 156, July 29, 2010, p. S6480.

A week later on the Senate floor, Senator Whitehouse again spoke in favor of the chamber deferring to a state's Senators who support the confirmation of a district court nominee from that state.

> It is also my understanding there has been a tradition in this body that while circuit court nominees are considered what one might call, for better or worse, political fair game, there has been a tradition of courtesy and comity regarding district court judges who sit in the Senator's home State when both of the home State Senators have agreed to and accepted the President's recommendations and supported it, given their blue slip to the committee, and so forth.[222]

In recent years, however, Senators, have often been less than unanimous in deferring to home state Senators' endorsements of district court nominees. Instead, roll call votes on these nominees, in the Judiciary Committee as well as on the Senate floor, increasingly have included "nay" votes,[223] In some instances, particularly in the 112th Congress, Senators have voted against confirmation even when the nominee was supported by a home state Senator of their own party.[224] Further, in various instances, Senators opposed to particular district court nominees have, through the use of "holds" or objections to unanimous consent requests, effectively blocked or delayed

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[222] Sen. Sheldon Whitehouse, "Unanimous Consent Request—Executive Calendar," remarks in the Senate, *Congressional Record*, daily edition, vol. 156, August 5, 2010, p. S6971. Senator Whitehouse also stated he would have liked, at that moment, to seek unanimous consent (UC) to keep on the Senate Executive Calendar two district court nominations that were supported by home state Senators—rather than see them returned to the President under the Senate's rules because the Senate was about to begin a recess of more than 30 days. He noted, however, that no Senators of the other party were present on the floor to respond to a UC request. Therefore, he said he would not make the request out of respect for "the tradition that one does not propound unanimous consent requests without a member of the minority party present to object or otherwise respond.…" Ibid., p. S6972. The two district court nominations in question had been specifically excluded in a UC request agreed to by the Senate earlier in the day that allowed various other nominations to remain in "status quo" on the Executive Calendar over the 30-plus-day recess. See Ibid., p. S6971 ("Unanimous Consent Request—Nominations"); hence, when the Senate adjourned for the recess, the two nominations were returned to the President.

[223] A recent Brookings Institution study has found an "increase in contested confirmation votes" on district court nominees, from presidency to presidency, during the first terms of Presidents William J. Clinton, George W. Bush, and Barack Obama (as of December 12, 2012). Specifically, it found the following:

> All of Clinton's first-term district confirmations came by voice vote or unanimous consent. Less than half of Bush's and Obama's district confirmations went that route. On roll call votes, 58 percent of Bush's district nominees got no negative votes, more than twice as many as Obama's district nominees (25 percent). One percent of Bush's district nominees, but 19 percent of Obama's district nominees got at least one negative vote, and nine percent got more than 21 negative votes.

Russell Wheeler, "Judicial Nominations and Confirmations in Obama's First Term," *Governance Studies at Brookings*, December 13, 2012, pp. 9-10, at http://www.brookings.edu/research/papers/2012/12/13-judicial-nominations-wheeler. See also, Goldman et al, "Obama's Judiciary at Midterm," pp. 280-281, for analysis of the increasing number of "no" votes cast in the Senate Judiciary Committee on district court nominations during the first two years of the Obama presidency. Authors on p. 280 noted, among other things, that of approximately 2,100 district court nominees reportedly processed from 1945 through 2010, "only five were reported out on a strict party line vote, with four of the five occurring the during the 111th Congress." The authors, also on p. 280, noted the "strong exception" that was taken by a committee minority staff member, interviewed by the authors, "to any notion that district nominees should be given a 'pass' from committee scrutiny...."

[224] During the 112th Congress, Members of the Senate's minority party voted against district court nominees supported by a home state Senator of their party in various instances, including when the Senate confirmed the following nominees: Susan Owen Hickey to the Western District of Arkansas on October 13, 2011, by an 83-8 vote; Robert David Mariani to the Middle District of Pennsylvania on October 19, 2011, by an 82-17 vote; Sharon L. Gleason to the District of Alaska on November 15, 2011, by an 87-8 vote; John M. Gerrard to the District of Nebraska on January 23, 2012, by a 74-16 vote; Miranda Due to the District of Nevada on March 28, 2012, by a 59-39 vote; and Jeffrey J. Helmick to the Northern District of Ohio on June 6, 2012, by a 62-36 vote.

Senate consideration of the nominees, sometimes for months at a time.[225] In any of these circumstances, Senators, by opposing a district court nominee's consideration or confirmation, presumably would take issue with the notion that they are obliged to defer to home state Senators who support the nominee.

Should Home State Senators Use Commissions to Aid Them in Selecting Judicial Candidates to Recommend to the President?

The American Bar Association, at its annual meeting in August 2008, adopted a resolution aimed at making the appointment process for lower court judges less contentious and less time-consuming. A key provision in the resolution was a proposal that bipartisan commissions be used to identify candidates for nomination to lower federal judgeships. Specifically, the ABA encouraged that each state's two U.S. Senators jointly appoint a bipartisan commission of lawyers and other leaders to evaluate candidates for U.S. district judgeships in the state and recommend which candidates the Senators should suggest for the President's consideration. The ABA resolution, as well, proposed the use of bipartisan commissions to consider and recommend prospective nominees to the U.S. circuit courts; while the resolution did not specify who would appoint these commissions, clarification on this point appeared to come from an *ABA Journal* news account, which stated that, according to the resolution, bipartisan commissions should be used by the President to help fill circuit court vacancies. The resolution recommended that the President "consult with Senate leaders of both parties and the home state senators in advance of submitting nominations," and it urged the President and the Senate "to promptly fill judicial vacancies and act expeditiously, especially with respect to nominees recommended by bipartisan commissions."[226]

Adoption of the resolution had been urged by the ABA's Standing Committee on Federal Judicial Improvements. In a report to the ABA convention, the committee suggested that use of bipartisan commissions, by instilling a greater degree of bipartisanship in the selection of nominees, could make the judicial confirmation process in the Senate less polarized, contentious and drawn out. The committee urged that the two U.S. Senators in every state

> jointly appoint truly bipartisan commissions of lawyers and non-lawyers to develop lists of potential district judge nominees for the consideration of the senators and the White House. When a state's senators are of the same political party, it may be appropriate to share the appointing authority with legislators and others in the state of the opposite party.[227]

[225] See, for example, Goldman et al., "Obama's Judiciary at Midterm," p.287, discussing "[s]everal different tactics used to delay floor action in the Senate on judicial nominees" during the first two years of the Obama presidency. For analysis of the extent to which there has been an increase, in recent years, in the average length of time that district and circuit court nominations wait, after being reported out of committee, to receive Senate confirmation votes, see CRS Report CRS Report R42556, *Nominations to U.S. Circuit and District Courts by President Obama During the 111th and 112th Congresses*, by Barry J. McMillion (under heading "Length of Time from First Committee Report to Confirmation").

[226] Edward A. Adams, "ABA Proposes Bipartisan Selection Process," *ABA Journal Law News Now*, August 11, 2008, at http://www.abajournal.com/news/aba_proposes_bipartisan_judicial_selection_process/ (with hyper-text link to the resolution in question—"Resolution 118").

[227] Ibid. The committee also urged that "the lawyers on the commissions reflect, as much as possible, the various elements and specializations within the bar and that overall commission membership reflect the diversity in the population of the state or part of the state served by the judicial district."

The ABA's August 2008 resolution failed to generate subsequent debate in Congress about the merits of using bipartisan commissions to recommend candidates for U.S. district or circuit court judgeships. Some news media organizations, however, reacted quickly to the resolution. Providing a negative assessment, the *Wall Street Journal,* in an editorial, maintained that the ABA proposal would diminish the President's constitutional power to select judicial nominees, by limiting his choice to "preapproved lists" of candidates provided by home state Senators and bipartisan commissions. Further, it said, "merit selection merely takes the partisan politics out of the public eye and into backrooms stocked with political insiders."[228] By contrast, a *Los Angeles Times* editorial asserted that

> adoption of the ABA proposal would improve the quality of the federal judiciary without infringing on the constitutional prerogatives of the president or the Senate. It even could lead to a truce in the tiresome partisan tit-for-tat in the Senate that has blocked the confirmation of qualified and moderate judicial nominees, a development the next president should welcome, regardless of who he is.[229]

The Obama Administration thus far has not established any commission-like entities to aid it in identifying or evaluating circuit court candidates. As of October 2012, however, nominating commissions reportedly were being used in 19 states by one or both Senators (34 in all) to screen candidates for federal court vacancies—up from 8 states in which such commissions were said to be in use in August 2008.[230] In one of the 19 states, a commission reportedly was tasked with recommending not only candidates for district court judgeships but also for circuit court judgeships historically associated with that state.[231]

In a study issued in mid-December 2012, a scholar reviewed the use by Senators of judicial nominating commissions up to that point in the Obama presidency.[232] In this review, the scholar sought answers to two questions—whether district court nominees selected through use of commissions (which he referred to as "vetting committees") had more diverse backgrounds than other Obama district court nominees, and whether they proceeded "through the nomination and confirmation process with less resistance." In measuring such possible effects of vetting committees on judicial nominee selection, the scholar cautioned that "the committees operate within state nomination cultures and senatorial practices that probably exert more influence on the process than do the committees." Taking into account that and other caveats,[233] the scholar found that

> the non-committee states have produced proportionately more nominations, and in less time, than the committee states. That may reflect the additional time and effort for at least

[228] "The ABA Plots a Judicial Coup," *Wall Street Journal,* August 14, 2008, p. A12.

[229] "Ruling on Judges," *Los Angeles Times,* August 24, 2008, p. A31.

[230] The American Judicature Society, "Federal Judicial Selection," at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD. This website link provides, for each of the 50 states and the District of Columbia, specific information on the nature of any commission, or similar screening mechanism, currently constituted to evaluate candidates for federal judgeships.

[231] Ibid, which stated that a commission was established in Hawaii to make recommendations for filling vacancies not only on that state's U.S. district court but also for vacancies on the U.S. Court of Appeals for the Ninth Circuit that were "appropriately considered Hawaii seats."

[232] Russell Wheeler, "Judicial Nominations and Confirmations in Obama's First Term," *Governance Studies at Brookings,* December 13, 2012, pp. 14-15, at http://www.brookings.edu/research/papers/2012/12/13-judicial-nominations-wheeler.

[233] Ibid. Wheeler also noted, on p. 14, that the vetting committees "vary in their apparent bi-partisanship, and it's often impossible to know if the names that a senator sends to the White House, or that the White House sends to the Senate, were among those recommended by the committee."

> some committees to do their work, compared to the less formal vetting processes that senators and their staffs employ when there is no committee to consult. States with committees, though, also produced proportionately more confirmations, again in less time. And in terms of the proportion of white males and former state judges, the two sets are almost identical.[234]

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

In Senate controversies over lower court nominations in recent years, a central question often has been whether an administration adequately consulted home state Senators during the nominee selection process. Usually, the question has concerned the degree to which opposition party Senators should play a role in advising the President on judicial nominee selections in their state.

Against this backdrop, both the Obama Administration and the Senate opposition party in the 111th Congress, as already noted, expressed, early in the Congress, the desire that the judicial confirmation process be less acrimonious. Both also advocated, as a key to that objective, increased consultation in the nominee selection process between the Administration and home state Senators, regardless of their party. Subsequently in the 111th Congress, while lower court nominations frequently were a subject of partisan contention in the Senate, the focal point of contention rarely, if ever, was whether the Administration adequately consulted with home state Senators.[235] In the 112th Congress, however, as discussed above,[236] the adequacy of Administration consultation did become a public issue for opposition party home state Senators in two states. Asserting they had not been consulted before the President made certain nominations to judgeships in their states, the Senators effectively blocked the nominations from receiving committee consideration, resulting ultimately in their being returned to the President.

Controversies of this nature possibly could have been avoided if certain past guidelines regarding Administration consultation with home state Senators had been observed. As noted earlier, various policy statements by past chairs of the Senate Judiciary Committee have listed various specific consultative steps which 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 and the current Administration might make a point of contacting each other before a nominee is actually selected.

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[234] Ibid.

[235] Instead, contention arose, among other things, over requests for unanimous consent in the Senate to consider particular nominations and over whether the Senate had processed a sufficient number of President Obama's nominations (and if not, why not). See, for example, Senate floor debate, in connection with requests for unanimous consent to consider several judicial nominations, and objections raised to those requests, in "Judicial Nominations," *Congressional Record*, daily edition, vol. 156, July 29, 2010, pp. S6476-S6486. For a journalistic account of the partisan controversy over why less than half of President Obama's judicial nominees, by September 2010, had been confirmed, see Seth Stern, "Bench-Clearing Brawl Continues," *CQ Weekly*, vol. 68, September 27, 2010, pp. 2213.

There also was partisan division in the Senate over whether or when to schedule and fit in floor consideration of judicial nominees (in light of other issues competing for the Senate's attention), and over the qualifications of certain nominees to serve as federal judges. See Jessica Brady, "Long Wait Persists for Judicial Hopefuls," *Roll Call*, vol. 56, September 13, 2010, pp. 3, 19; David Ingram, "GOP Hammers 2nd Circuit Nominee on Death Penalty Case," *The National Law Journal*, April 29, 2010, at http://www.law.com; and David Ingram, "Despite Opposition, Liu's 9th Circuit Nomination Heads to Full Senate," *The National Law Journal*, May 14, 2010, at http://www.law.com.

[236] See above in this report, under the heading "During the Obama Presidency."

Such contact, it can be argued, would at least avert controversy arising over a Senator not being consulted at all about a judicial nomination.

Experience in recent Congresses, however, suggests that, even when there is consultation, reaching agreement on the choice of a nominee might not always be an easy or simple matter. 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.

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.

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