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Implications for the Senate of President Bush's Proposal on Judicial Nominations

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Summary

President Bush has said that the current process for confirming federal appellate and district court judges is too partisan and has broken down, echoing a critique raised by most contemporary Presidents. In late 2002, Bush proposed a series of changes to the system that, he argues, would accelerate the process by setting timetables for action and guaranteeing a Senate vote on each nominee. The proposal raises questions about the traditional powers of the Senate and its constitutional role in offering "advice and consent" on the dozens of nominations submitted each year for the third branch of government, the judiciary. This report will be updated as events warrant.

Background

The Constitution gives both the President and the Senate authority over the appointment of federal judges to the U.S. courts of appeal and the U.S. district courts. The President is authorized to make the selection "by and with the Advice and Consent of the Senate," in Article II, Section 2.

Congress and contemporary Presidents have struggled over the many issues involved in the selection and confirmation of federal judges, from what should be considered when making a choice for a lifetime appointment to how fast the process should work. Republican President Ronald Reagan found it much more difficult than his predecessors to get his judges through a Senate controlled by Democrats in the 100th Congress.[1] Presidents since Reagan have encountered problems winning approval of their judicial nominees, particularly when the Senate is controlled by the opposing party.[2]

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[1] See CRS Report RL31635, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2002*, by (name redacted) and (name redacted).

[2] Elliot E. Slotnick, "A Historical Perspective on Federal Judicial Selection," *Judicature*, vol. 86, July-August 2002, pp. 13-16. See also, "Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2002."

The nominations process for lifetime appointments to U.S. district court and U.S. circuit court of appeals judgeships involves several steps.[3] The President begins the process by selecting an individual to fill a judicial vacancy and submitting a nomination in writing to the Senate. The nomination may follow some consultation by the President with Senators from the state where the vacancy exists, particularly if the Senators are from the same political party as the President. Usually the same day the nomination is received by the Senate, it is referred to the Judiciary Committee, the Senate committee having jurisdiction over nominations to circuit and district courts. Next, the Judiciary Committee may hold a hearing on the nomination, followed by a committee vote on whether to report the nomination to the full Senate and what recommendation to make to the Senate. If the nomination is sent to the full chamber, the final step occurs if the Senate votes to confirm or reject the nomination. Confirmation requires a simple majority vote. If the Senate votes in the negative on whether to confirm, a resolution of disapproval is sent to the President.

Judicial nominations sometimes fail to advance through each procedural step in the appointment process. After referral to committee, a judicial nomination might fail to receive a hearing or, after receiving a hearing, might fail to receive a committee vote on whether it should be reported. Even if reported by the Judiciary Committee, the nomination might fail to receive a vote by the Senate on whether to confirm. If it fails to receive a Senate vote, the nomination ultimately may be withdrawn by the President or may be returned to him by the Secretary of the Senate upon a Senate adjournment or recess of more than 30 days. Any nomination on which the Senate has not acted by the end of a two-year Congress is automatically returned to the President[4]

One reason why a judicial nomination may not make it through the process is known as "blue slipping." According to a long-standing tradition in the Senate, when a judicial nomination is received by the Judiciary Committee, the chair sends a notice, called a blue slip, to the two Senators who represent the home state of the nominee, asking for their opinion of the nominee, whether they approve or disapprove. Senators can return the slip marked either with their approval or disapproval of the nominee or, sometimes, will hold on to the slip and refuse to return it. There has been debate among Senators about how strongly a negative blue-slip should be weighed in the process — should one negative slip block a nominee or should it take two? Should a blue slip be considered advisory only?[5]

There have also been instances of judges not receiving a final vote on the Senate floor. During the 108th Congress, the Senate took 20 votes to invoke cloture, or shut off debate, on 10 different nominees to the federal bench; none succeeded. This situation has led some Senators to debate whether the Senate should change its rules regarding cloture,

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[3] See CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by (name redacted).

[4] Rule XXXI, paragraph 6, *Standing Rules of the Senate*, provides that "...if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President and shall not again be considered unless they shall again be made to the Senate by the President."

[5] Brannon P. Denning, "The Judicial Confirmation Process and the BLUE SLIP," *Judicature*, vol. 85, Mar.-Apr. 2002, pp. 218-226.

even if the chamber must circumvent existing rules to do so, a procedure called the "nuclear option," or "constitutional option."[6]

Critics of the judicial confirmation process say it has two major problems: it has become slow and partisan. The end result has been a number of vacancies on the federal bench, some lasting for years. In 2000, the Task Force on Federal Judicial Selection, a subset of Citizens for Independent Courts, a group founded by The Constitution Project, documented that in the 95th Congress (1977-78), the Senate took, on average, 38 days from the receipt of a nomination to final action on it. By the 105th Congress, the Senate took, on average, 201 days from the time it received a nomination to final action on that nomination. [7]

U.S. Supreme Court Chief Justice William H. Rehnquist, in 1997 and again in 2001, urged the Senate to act more quickly on nominees for the federal bench. "The Senate ought to act with reasonable promptness and to vote each nominee up or down," he wrote in 2001. "The Senate is not, of course, obliged to confirm any particular nominee. But it ought to act on each nominee and to do so within a reasonable time."[8] Currently, there are 871 authorized Article III lifetime appointment judgeships, which are appointed by the President and confirmed by the Senate. As of March 8, 2005, there were 42 vacancies on the federal bench.[9]

A New Time Line

President Bush has placed a high priority on winning Senate confirmation of his judicial nominees, and has said he believes the current confirmation system does not work well.[10] Even before announcing his time line proposal, Bush on March 22, 2001, changed the process by deciding not to get a formal evaluation from the American Bar Association (ABA) on each of his judicial nominees. Since 1952, the ABA had evaluated each candidate, reviewing his or her integrity, professional competence, and judicial temperament. The group then issued a rating of well qualified, qualified, or not qualified. Prior to Bush's announcement, this ABA review was done before the nominee's name

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[6] For more information on these options, see CRS Report RL32684, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option*, by (name redacted). For more information on the Senate and nominations, see CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by (name redacted). For additional information on the Senate's cloture rule, see CRS Report RL32149, *Proposals to Change the Senate Cloture Rule*, by Christopher M. Davis and (name redacted).

[7] Thomas O. Sargentich et al., *Uncertain Justice: Politics and America's Courts* (Washington: The Constitution Project, 2000), p. 64.

[8] Chief Justice William H. Rehnquist, "2001 Year-End Report on the Federal Judiciary," *The Third Branch*, vol. 34, Jan. 2002, p. 1. Also at [http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html]; visited Mar. 10, 2005.

[9] U.S. Department of Justice, Office of Legal Policy, "Judicial Nominations - 109th Congress," available at [http://www.usdoj.gov/olp/judicialnominations.htm], visited Mar. 10, 2005.

[10] Bill Sammon, "President to Revive Court Picks, Push for Homeland Security," *Washington Times*, Nov. 8, 2002, p. A16.

was sent to the Senate. The ABA continues to review judicial candidates, but the review is not a formal part of the process.[11]

On October 30, 2002, President Bush announced a series of proposed changes to the judicial nomination process. Bush said that "our federal courts today are in crisis. The judicial confirmation process does not work as it should. Nominees are too often mistreated; votes are delayed; hearings are denied. And dozens of federal judgeships sit empty, and this endangers the quality of justice in America."[12]

The new process would begin when a sitting federal judge decided to retire and would inform the President. Under the plan, the judge would give the President as much as a year's notice of his or her intent to retire before actually leaving the bench. Currently, there is no uniform standard on how much notice a judge must give before retiring. The President would then have up to six months to chose a nominee and send his or her name to the Senate for confirmation.

The President's plan would require the Senate Judiciary Committee to hold a hearing on a nomination within 90 days. The plan indicates that this deadline should be a strict one, which would apply no matter who is President and which party controls the Senate.

The next step in the process would traditionally be the consideration of the nominee by the Senate Judiciary Committee. The President's proposal makes no mention of if or when the Judiciary Committee should vote on a nominee. The proposal skips the committee markup stage entirely, going directly from a required hearing in the committee to a required vote on the floor of the Senate.

The plan would require the full Senate to hold a vote within six months of the Senate's receipt of a nomination. The goal, according to the proposal, is to make sure that "All Senators will have an opportunity to have their voices heard and their votes counted." If all the guidelines in the President's proposal were followed, Senate consideration of a nomination would take no more than 12 months after the President learns there will be a vacancy on the bench.

The Bush plan is the latest in a series of proposals to overhaul the confirmation process. In 1996, the White Burkett Miller Center of Public Affairs at the University of Virginia, assembled a Commission on the Selection of Federal Judges. That 11-member, bipartisan panel included former Republican Majority Leader Howard Baker and former Democratic Senator Birch Bayh. The panel found that the process for choosing and vetting nominees for federal judgeships had become much more complicated and time-consuming, during the last two decades. The commission made a series of specific recommendations on how to improve the process, from streamlining and combining into one form the various questionnaires prospective judges fill out, to calling on the Senate

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[11] Amy Goldstein, "Bush Curtails ABA Role in Selecting U.S. Judges," *Washington Post*, Mar. 23, 2001, p. A01.

[12] U.S. President (Bush), "Remarks on the Judicial Confirmation Process," *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 4, 2002, pp. 1890-1892.

Judiciary Committee to bring nominees to a vote before the full Senate within two months of receiving a nomination. The Senate did not act on the panel's recommendations. [13]

A second panel, the 2000 task force of the Citizens for Independent Courts, found that the process for nominating and confirming federal judges had become not only long and slow, but also highly politicized and polarized. The panel called for a series of changes to the system, which focused more on de-politicizing the process than on a specific timetable for action, though the task force did endorse the Miller plan's goal of seating a judge on the bench within about nine months of a vacancy.[14]

Newspaper editorials split in their reaction to the President's proposal. "President Bush has put forth a plan for speeding up confirmation of his judicial nominees that misstates the problem and proposes to solve it by placing the burden on Congress and the judiciary. The administration should turn its attention to the real roadblock — its own overly ideological, and often slow-moving, method of selecting nominees," wrote the *New York Times*.[15]

"Senators from both major parties have sabotaged many presidential nominations to federal judgeships," wrote the *Hartford Courant*. Under the Bush plan, "there would be a beginning and an end to the process, unlike the endless wait that takes place now...Mr. Bush has offered a reasonable way out..."[16]

Implications for the Senate

The Bush plan is designed to speed Senate consideration of judicial nominations, and, as such, raises questions about its impact on the Senate's advise and consent role were the plan to be adopted. If adopted, it could mean several of the traditional powers of the Senate and individual Senators would be circumscribed. "Committing in advance to a certain timetable would rob the Senate of its independence and its responsibility to consider these issues as long as it needs to," Senate Historian Richard A. Baker told the *Washington Post*. "The framers of the Constitution expected the Senate to slow things down, and that has annoyed a lot of presidents over the two centuries," Baker said.[17]

The plan raises a question about the ability of an individual Senator to use the power of the blue-slip to block action on a nomination. Under the Bush plan, even if both home-state Senators opposed a nominee, the full Senate would still be required to vote up or

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[13] The White Burkett Miller Center of Public Affairs (University of Virginia), *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges*, (Charlottesville: University of Virginia, 1996), pp. 6-10.

[14] Sargentich, *Uncertain Justice*, p. 22.

[15] "The Real Problem in Making Judges," *New York Times*, Nov. 1, 2002, p. A30.

[16] "Judicial Nominations in Limbo," *Hartford Courant*, Nov. 3, 2002, p. C2.

[17] Mike Allen and Amy Goldstein, "Bush Has Plan to Speed Judicial Confirmations," *Washington Post*, Oct. 31, 2002, p. A21.

down on the nomination. The ability to block or stall action, while perhaps frustrating to observers, is a key institutional power of any Senator.

The President's time line could make the process more difficult for home-state Senators to maintain their influence over judicial nominations. To hold to the deadlines recommended by the President, home-state Senators would be compelled to send their choices to the President quite rapidly once it became known a vacancy was going to occur, to allow the White House time to review the choices before the President made his selection and sent it to the Senate. Historically, Senators tend to be important players in the selection of district court nominees in their states; a Senator tends to have less of an influence on the choice for an appellate nominee, where a court's jurisdiction includes more than one state.[18]

With the streamlined procedures for all judicial nominations, the President might feel less pressure to consult with Senators about judges in their home states and regions. That could tip the balance of power on the selection of such nominees toward the President.

The plan also raises questions about the power of the Senate Judiciary Committee to take meaningful action on judicial nominations. If the full Senate were required to act on every judicial nomination within six months of receiving it, would it cancel out the role played by the Judiciary Committee? Even if the committee rejected a nominee, the nomination would still go to the full Senate for a vote. During the 107th Congress, there was intense debate over the proper role of the committee in the judicial nomination process. The nominations of two judges were defeated by a vote of the Senate Judiciary Committee and their names did not go before the full Senate for a vote.[19]

On its face, the President's plan proposes to reduce the length of time it takes to fill judicial vacancies. It describes a specific timetable that would have the President's nominations for such vacancies voted on by the full Senate within six months.

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[18] Sheldon Goldman, *Picking Federal Judges; Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), p. 10.

[19] Helen Dewar, "Senate Panel Rejects Bush Court Nominee," *Washington Post*, Sept. 6, 2002, p. A01. Priscilla Owen and Charles W. Pickering Sr. were both nominated for seats on the U.S. Court of Appeals for the 5th Circuit and were renominated by President Bush in 2003 and 2005.