

CRS Report for Congress

Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress

April 9, 2007

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**Prepared for Members and
Committees of Congress**

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Summary

This report tracks nominations made by President George W. Bush to judgeships on the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade — the lower courts on which, pursuant to Article III of the Constitution, judges serve “during good Behaviour.” It lists and keeps count of all nominations made to these courts during the 110th Congress, including pertinent actions taken by the Senate Judiciary Committee and the full Senate. It also tracks the number of judicial vacancies on the courts (including vacancies classified by the federal judiciary as “judicial emergencies”), the number of nominations pending to fill the vacancies, and the names of the pending nominees. Last, the report presents the total number of persons nominated by President Bush to each category of lower Article III court during his entire presidency (breaking down each total to show the number confirmed, pending, returned and not re-nominated, and withdrawn).

As of April 9, 2007:

- President Bush had nominated eight individuals to judgeships on the U.S. courts of appeals during the 110th Congress, with the Senate having confirmed two of them.
- President Bush had nominated 36 individuals to U.S. district court judgeships during the 110th Congress, with the Senate having confirmed 13 of them.
- There were 14 judicial vacancies on the U.S. courts of appeals, with six nominations pending to fill these vacancies.
- There were 33 U.S. district court vacancies, with 21 nominations pending to fill these judgeships, and an additional two nominations pending to fill future district court vacancies.
- No vacancies had occurred on the U.S. Court of International Trade during the 110th Congress (and thus no nominations have been made to the court during the Congress).
- During his entire presidency (from January 20, 2001 to the present), President Bush had made 315 nominations to Article III lower court judgeships. Of the 315 total, 271 had received Senate confirmation, 29 were pending in the 110th Congress, nine had been returned to the President in a previous Congress and not resubmitted, and six had been withdrawn by the President.

For corresponding information about President Bush’s appeals and district court nominations during earlier Congresses, see CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

This report will be updated to record new actions by President Bush, the Senate Judiciary Committee, or the Senate involving Article III lower court nominations.

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Nominations to Article III Lower Courts by President George W. Bush During the 110th Congress

Introduction

In recent years, Congress has expressed increasing interest in the nomination and confirmation process for lower federal court judges.¹ To provide Congress with a current overview of this process, this report tracks the status of certain lower court nominations made by President George W. Bush during the 110th Congress. The report deals primarily with nominations to lower Article III courts (those courts on which judges serve “during good Behaviour”), while also accounting for infrequent nominations to the small number of territorial district judgeships, which have fixed-term appointments.²

The Article III Lower Courts

Article III, Section 1 of the Constitution provides, in part, that the “judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It further provides that justices on the Supreme Court and judges on lower courts established by Congress under Article III have what effectively has come to mean life tenure, holding their office “during good Behaviour.”³ By contrast, judges in various federal courts established by Congress under Article I of the Constitution are appointed for

¹ See, for example, Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford, CA: Stanford University Press, 2005); Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005); Sheldon Goldman, “Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts,” *University of Richmond Law Review*, vol. 39, March 2005, pp. 871-908; Stephen B. Burbank, “Politics, Privilege & Power: The Senate’s Role in the Appointment of Federal Judges,” *Judicature*, vol. 86, Jul.-Aug. 2002, pp. 24-27; and Elliot E. Slotnick, “A Historical Perspective on Federal Judicial Selection,” *Judicature*, vol. 86, Jul.-Aug. 2002, pp. 13-16.

² For a detailed narrative and statistical analysis of President George W. Bush’s lower court nominations during the first six years of his presidency, see CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

³ Pursuant to this constitutional language, Article III judges may hold office for as long as they live or until they voluntarily leave office. A President has no power to remove them from office. Article III judges may be removed by Congress only through the process of impeachment by the House and conviction by the Senate.

fixed terms.⁴ Along with the Supreme Court, the courts that constitute the Article III courts in the federal judicial system are the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade. The following are thumbnail descriptions of each of the lower Article III courts:

The U.S. Courts of Appeals. These courts take appeals from federal trial court decisions and are empowered to review the decisions of many administrative agencies. Cases presented to these courts are generally considered by judges sitting in three-member panels. Altogether, 179 permanent appellate court judgeships are authorized by law. Courts within the courts of appeals system are often called “circuit courts,” because they are divided into 12 geographic circuits and an additional nationwide circuit, the Federal Circuit, which has specialized subject matter jurisdiction. In this report, nominations to U.S. courts of appeals judgeships are referred to as “circuit court nominations.”

The U.S. District Courts. These are the trial courts of general federal jurisdiction. Each state has at least one district court, while some states have as many as four. There are 674 district court judgeships authorized by law, including those for the District of Columbia and the Commonwealth of Puerto Rico.⁵

The U.S. Court of International Trade. This court has original and exclusive jurisdiction over civil actions against the United States, its agencies and officers, and certain civil actions brought by the United States arising out of import transactions and federal statutes affecting international trade. The court is composed of nine judges, no more than five of whom may belong to one political party.

Congress also has established district courts in the territories of Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. Like the U.S. district courts, the territorial courts are trial courts of general federal jurisdiction, while also having jurisdiction over many local matters that, within the 50 states, are handled in state courts. Because they are trial courts of general federal jurisdiction, whose rulings may be appealed to a U.S. court of appeals,⁶ the territorial courts can be viewed as

⁴ Citing the power to do so in Article I of the Constitution, Congress, in separate statutes, has created four courts of specialized subject matter jurisdiction — the U.S. Court of Federal Claims, the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces — and has authorized 15-year judicial tenure in these courts.

⁵ The 674 total consists of 663 permanently authorized judgeships and 11 “temporary” judgeships (which, pursuant to statute, temporarily increase the *number* of judgeships for specified judicial districts. These districts revert back to the permanently authorized number of judgeships at a future time fixed by the statute — typically, when, after a specified number of years, a judgeship in the district is vacated).

⁶ Decisions of the U.S. District Courts for the District of Guam and the District of the Northern Mariana Islands are appealed to the Ninth Circuit Court of Appeals. Decisions of the U.S. District Court for the District of Virgin Islands are appealed to the Third Circuit Court of Appeals.

a category of court falling within the federal district court system.⁷ Territorial courts, however, are not Article III courts, and judicial appointees to these courts serve 10-year terms, with one judgeship each in Guam and the Northern Mariana Islands, and two in the Virgin Islands.

Judicial Nomination Data Tracked

This report lists and keeps count of all nominations made to the above-discussed courts during the 110th Congress, including certain actions taken on these nominations by the Senate Judiciary Committee and the full Senate. The report also provides statistics for all of the nominations that President Bush has made to these courts during his entire presidency, starting with the 107th Congress in January 2001 and carrying through to the present. (Thus far in the 110th Congress, no nominations have been made either to the Court of International Trade or to the territorial district courts, although President Bush made, and the Senate confirmed, nominations to these courts during previous Congresses.)

In the following pages, President Bush’s nominations to the lower Article III courts are listed or counted in **Tables 1** through **6**. Some of these tables, where noted, also keep track of nominations made to the territorial courts. **Appendix 1** provides a brief textual overview of the principal steps in the process for appointing lower court judges.

Judicial Nomination Tables for the 110th Congress

Table 1 is a judicial vacancy table. For each type of Article III lower court — circuit, district, and Court of International Trade — it shows the number of judgeships vacant as of the date listed, as well as the number of nominations pending to fill those judgeships. **Table 1** also displays the number of nominations pending to fill “future vacancies,” which occur when judges in active service announce their retirement to occur on a date that has not yet been reached or when a judge in active service indicates a plan to retire or take senior status upon the confirmation of a successor.

In addition, **Table 1** shows how many of these vacancies are classified by the federal judiciary as “judicial emergencies.” For the courts of appeals, a judicial emergency is any vacancy in a circuit where there are more than 700 adjusted filings per panel, or any vacancy in a circuit that has existed for more than 18 months and

⁷ For instance, the federal judiciary subsumes territorial courts under the heading of “District Courts” in various places on its website, at [<http://www.uscourts.gov>]. In one link on the website, entitled “Authorized Judgeships,” accessed via [<http://www.uscourts.gov/judicialvac.html>], the judiciary lists the number of authorized judgeships, respectively, on the Supreme Court, the circuit courts, the district courts, and the Court of International Trade. The link, under the heading of “District Courts,” provides an “Article III” sub-heading (with 674 judgeships) and a “Territorial Court” sub-heading (with 4 judgeships), and, in an adjacent column, 678 is shown to be total number of judgeships for the “District Courts” heading.

where adjusted filings are between 500 to 700 per panel. For a district court, a judicial emergency is any vacancy in a district where weighted filings exceed 600 per judgeship, or any vacancy in existence more than 18 months where weighted filings are between 430 and 600 per judgeship, or any court with more than one authorized judgeship and only one active judge.

Table 1. Vacancies in Article III Lower Court Judgeships
(as of April 9, 2007)

Court	Vacancies	Nominations Pending		Judicial Emergencies	
		For Existing Vacancies	For Future Vacancies	Number	Nominees Pending
U.S. Courts of Appeals	14	6	0	11	5
U.S. District Courts	33	21	2	9	6
U.S. Court of International Trade	0	0	0	0	0
Total	47	27	2	20	11

Source: CRS analysis of data provided by the Administrative Office for the United States Courts, available at [<http://www.uscourts.gov/judicialvac.html>].

Table 2, which lists pending nominations, presents all Article III lower court nominations made during the 110th Congress and pending as of the date listed. The table shows the date each nomination was received by the Senate, the date of any hearing on the nomination before the Judiciary Committee, and the date of any vote by the committee to report the nomination to the Senate. The table also indicates which nominations in the list are renominations — persons nominated to the same judgeship either earlier in the 110th Congress or in a previous Congress.

**Table 2. Pending Nominations to the U.S. Courts of Appeals,
District Courts, and Court of International Trade
in the 110th Congress**
(as of April 9, 2007)

No.	Name of Nominee	Court	Date		
			Received by Senate	Hearing	Committee Action
Circuit Courts of Appeals					
1	Keisler, Peter D. ^a	D.C.	1/9/07	^b	
2	Livingston, Debra A. ^a	Second	1/9/07		
3	Southwick, Leslie	Fifth	1/9/07		
4	Kethledge, Raymond M. ^a	Sixth	3/19/07		
5	Murphy, Stephen J., III ^a	Sixth	3/19/07		
6	Elrod, Jennifer W.	Fifth	3/29/07		
District Courts					
1	Donohue, Mary O. ^a	N.NY	1/9/07		
2	Farr, Thomas Alvin ^a	E.NC	1/9/07		
3	Kapala, Frederick J. ^a	N.IL	1/9/07	3/13/07	
4	Mauskopf, Rosslyn R. ^a	E.NY	1/9/07		
5	O'Grady, Liam ^a	E.VA	1/9/07		
6	Osteen, William L., Jr. ^a	M.NC	1/9/07		
7	Ozerden, Halil S. ^a	S.MS	1/9/07	3/13/07	
8	Reidinger, Martin K. ^a	W.NC	1/9/07		
9	Rogan, James E. ^a	C.CA	1/9/07		
10	Schroeder, Thomas D. ^a	M.NC	1/9/07		
11	Settle, Benjamin H. ^a	W.WA	1/9/07	3/13/07	
12	Van Bokkelen, Joseph S.	N.IN	1/9/07		
13	DeGiusti, Timothy D.	W.OK	2/15/07		
14	Sullivan, Richard	S.NY	2/15/07		
15	Aycock, Sharion	N.MS	3/19/07		
16	Dugas, David R.	M.LA	3/19/07		
17	Hall, James R.	S.GA	3/19/07		
18	Honaker, Richard H.	WY	3/19/07		
19	Jones, Richard A.	W.WA	3/19/07		
20	Jonker, Robert J. ^a	W.MI	3/19/07	^b	
21	Maloney, Paul L. ^a	W.MI	3/19/07	^b	
22	Neff, Janet T.	W.MI	3/19/07	^b	
23	Sammartino, Janis L.	S.CA	3/19/07		
Court of International Trade					
(There are no pending nominations to the Court of International Trade)					

Source: CRS Judicial Nominations Database

- a. Renomination of an individual first nominated in the 109th Congress (2005-2006).
b. The individual received a hearing in the 109th Congress on a nomination to the same position.

Tables 3 and 4 list all nominations to the circuit courts of appeals and to the district courts, respectively, made by President Bush during the 110th Congress, as

of the date listed, and any actions taken on the nominations.⁸ The nominations are listed in chronological order according to the date on which each was received by the Senate. The tables show how far along each nomination has progressed in the appointment process, with separate columns indicating the date on which any of the following occurred:

- the Judiciary Committee held a hearing on the nomination,
- the committee voted to report or take other action on the nomination,
- or
- the Senate voted for confirmation or some other final action.

When final action has occurred on a nomination, the nature of the action is indicated in another column, under the heading “Disposition.” (For each nomination, one of four kinds of disposition is possible — confirmation by the Senate, return of the nomination to the President, withdrawal by the President, and rejection by the Senate. During George W. Bush’s presidency, however, the Senate has never voted to reject a judicial nomination.) An additional column, for nominations receiving a Senate confirmation vote, indicates whether the vote was by roll call (by supplying the roll call tally) or by voice vote.

A final column in **Tables 3** and **4** presents time-span information for nominations having received final action in the 110th Congress. Specifically, for each such nomination, the column measures the number of days that elapsed between a nominee’s first nomination to a particular judgeship and the final action on this (the most recent) nomination. In some cases, a nominee has been nominated only once by President Bush for a judgeship, and the time span measured for such a nominee in the final column in **Tables 3** and **4** is the number of days that elapsed between the date during the 110th Congress that the nomination was received in the Senate and the date it received final action. However, in other cases, a judicial nominee in the 110th Congress has been nominated more than once, with one or more nominations of that person having been made in an earlier Congress. For such a nominee, the final column in **Tables 3** and **4** measures the number of days that elapsed between the nominee’s first nomination in the earlier Congress and the date that the nominee’s nomination in the 110th Congress received final action.⁹

Table 3 shows that, thus far in the 110th Congress, President Bush has nominated eight individuals to circuit court judgeships, two of whom have been confirmed by the Senate. **Table 4** shows that, thus far in the 110th Congress, the President has nominated 36 individuals to district court judgeships, 13 of whom have been confirmed.

⁸ In the event any nominations are made to the territorial district courts, they will be listed in **Table 4**, and treated as falling within the category of district court nominations, even though, as discussed above, they are not Article III court nominations. Thus far during the 110th Congress, no nominations have been made to the territorial courts.

⁹ In the event a person were nominated for the first time to a judgeship during the 110th Congress, only to be re-nominated during the 110th Congress, the final column in **Tables 3** and **4** would show, in the row for the nominee’s last nomination, the time elapsed between date of first nomination and date of final action on the last nomination.

Table 5, for the present, is an empty table, which exists to account for any future nominations that President Bush might make to the U.S. Court of International Trade. (Thus far during the 110th Congress, no nominations have been made to this court.) The table is of the same format as **Tables 3** and **4**. Accordingly, in the event any nominations are made to the court, the table will list actions on the nominations by the Judiciary Committee and the Senate, any other final action taken, and number of days elapsed between the date of nomination and date of final action.

Table 3. President George W. Bush's Nominations to the U.S. Circuit Courts of Appeals During the 110th Congress (January 3, 2007 - April 9, 2007)

No.	Name of Nominee	State	Court	Date				Disposition	Vote ^a	Days Elapsed, First Nomination to Final Action
				Nomination Received	Hearing	Committee Action	Final Action			
1	Hardiman, Thomas M. ^b	PA	Third	1/9/07	^d	3/8/07	3/15/07	Confirmed	95-0	183
2	Keisler, Peter D. ^b	MD	D.C.	1/9/07	^d					
3	Livingston, Debra A. ^b	NY	Second	1/9/07						
4	Smith, N. Randy ^b	ID	Ninth	1/9/07	^d		1/16/07	Withdrawn	—	—
5	Southwick, Leslie	MS	Fifth	1/9/07						
6	Smith, N. Randy ^{b, c}	ID	Ninth	1/16/07	^d	2/8/07	2/15/07	Confirmed	94-0	426
7	Kethledge, Raymond M. ^b	MI	Sixth	3/19/07						
8	Murphy, Stephen J., III ^b	MI	Sixth	3/19/07						
9	Elrod, Jennifer W.	TX	Fifth	3/29/07						

Source: CRS Judicial Nominations Database

a. A numerical tally indicates a roll call vote on confirmation (the yeas followed by the nays). "Voice" indicates that the nomination was confirmed by voice vote.

b. Renomination of an individual first nominated in the 109th Congress (2005-2006).

c. Smith was withdrawn as a nominee for a seat vacated by Stephen Trott and resubmitted, the same day, for a seat vacated by Thomas Nelson.

d. The individual received a hearing in the 109th Congress on a nomination to the same position. For additional information, see Appendices 1 and 4 in CRS Report RL31868, *U.S.*

Circuit and District Court Nominations by President George W. Bush During the 107th 109th Congresses, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

**Table 4. President George W. Bush's Nominations to the U.S. District Courts During the 110th Congress
(January 3, 2007 - April 9, 2007)**

No.	Name of Nominee	Court	Date				Disposition	Vote ^a	Days Elapsed, First Nomination to Final Action
			Nomination Received	Hearing	Committee Action	Final Action			
1	Bailey, John P. ^b	N.WV	1/9/07	2/6/07	3/1/07	3/15/07	Confirmed	Voice	260
2	Baker, Valerie L. ^b	C.CA	1/9/07	^c	1/25/07	2/1/07	Confirmed	Voice	273
3	Bryant, Vanessa L. ^b	CT	1/9/07	^c	3/8/07	3/28/07	Confirmed	Voice	427
4	Donohue, Mary O. ^b	N.NY	1/9/07						
5	Farr, Thomas Alvin ^b	E.NC	1/9/07						
6	Fischer, Nora B. ^b	W.PA	1/9/07	^c	2/8/07	2/14/07	Confirmed	97-0	216
7	Frizzell, Gregory K. ^b	N.OK	1/9/07	^c	1/25/07	2/1/07	Confirmed	99-0	239
8	Gutierrez, Philip S. ^b	C.CA	1/9/07	^c	1/25/07	1/30/07	Confirmed	97-0	281
9	Howard, Marcia M. ^b	M.FL	1/9/07	^c	2/8/07	2/15/07	Confirmed	93-0	253
10	Jarvey, John A. ^b	S.IA	1/9/07	^c	2/8/07	3/8/07	Confirmed	95-0	253
11	Kapala, Frederick J. ^b	N.IL	1/9/07	3/13/07					
12	Lioi, Sara E. ^b	N.OH	1/9/07	^c	2/8/07	3/8/07	Confirmed	Voice	238
13	Mauskopf, Rosslyn R. ^b	E.NY	1/9/07						
14	O'Grady, Liam ^b	E.VA	1/9/07						

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No.	Name of Nominee	Court	Date				Disposition	Vote ^a	Days Elapsed, First Nomination to Final Action
			Nomination Received	Hearing	Committee Action	Final Action			
15	O'Neill, Lawrence J. ^b	E.CA	1/9/07	^c	1/25/07	2/1/07	Confirmed	97-0	183
16	Osteen, William L., Jr. ^b	M.NC	1/9/07						
17	Ozerden, Halil S. ^b	S.MS	1/9/07	3/13/07					
18	Reidinger, Martin K. ^b	W.NC	1/9/07						
19	Rogan, James E. ^b	C.CA	1/9/07						
20	Schroeder, Thomas D. ^b	M.NC	1/9/07						
21	Settle, Benjamin H. ^b	W.WA	1/9/07	3/13/07					
22	Van Bokkelen, Joseph S.	N.IN	1/9/07						
23	Wood, Lisa G. ^b	S.GA	1/9/07	^c	1/25/07	1/30/07	Confirmed	97-0	232
24	Wright, Otis D., II ^b	C.CA	1/9/07	2/6/07	3/1/07	3/15/07	Confirmed	Voice	191
25	Wu, George H. ^b	C.CA	1/9/07	2/6/07	3/1/07	3/27/07	Confirmed	95-0	203
26	DeGiusti, Timothy D.	W.OK	2/15/07						
27	Sullivan, Richard	S.NY	2/15/07						
28	Aycock, Sharion	N.MS	3/19/07						
29	Dugas, David R.	M.LA	3/19/07						
30	Hall, James R.	S.GA	3/19/07						
31	Honaker, Richard H.	WY	3/19/07						

No.	Name of Nominee	Court	Date				Disposition	Vote ^a	Days Elapsed, First Nomination to Final Action
			Nomination Received	Hearing	Committee Action	Final Action			
32	Jones, Richard A.	W.WA	3/19/07						
33	Jonker, Robert J. ^b	W.MI	3/19/07	^c					
34	Maloney, Paul L. ^b	W.MI	3/19/07	^c					
35	Neff, Janet T. ^b	W.MI	3/19/07	^c					
36	Sammartino, Janis L.	S.CA	3/19/07						

Source: CRS Judicial Nominations Database

a. A numerical tally indicates a roll call vote on confirmation (the yeas followed by the nays). “Voice” indicates that the nomination was confirmed by voice vote.

b. Renomination of an individual first nominated in the 109th Congress (2005-2006).

c. The individual received a hearing in the 109th Congress on a nomination to the same position. For additional information, see Appendices 5 and 8 in CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden.

Table 5. President George W. Bush’s Nominations to the Court of International Trade During the 110th Congress (January 3, 2007- April 9, 2007)

No.	Name of Nominee	State	Court	Date				Days Elapsed, First Nomination to Final Action
				Nomination Received	Hearing	Committee Action	Final Action	
Thus far, during the 110 th Congress, there have been no nominations to this court.								

Source: CRS Judicial Nominations Database

Table 6 presents the total number of persons nominated by President Bush to each category of lower Article III court during his entire presidency. The table also breaks down each numerical total, showing, as of the date listed, the number of nominees whose most recent nominations were: (1) confirmed; (2) pending in the Senate; (3) returned to the President, at the end of a Congress or at the start of a Senate recess of more than 30 days, and not re-submitted; or (4) withdrawn by the President. This table accounts only for the number of persons who were nominees to a particular judgeship during George W. Bush's presidency. The table does not count resubmitted nominations made when President Bush renominated individuals to the same judgeship.¹⁰

Table 6. President George W. Bush's Nominees to Article III Lower Courts: A Numerical Breakdown According to Status of Their Most Recent Nomination (January 20, 2001 - April 9, 2007)

Court	Confirmed	Pending	Returned, Not Renominated	Withdrawn	Total
Courts of Appeals	53	6	8	3	70
District Courts ^a	216	23	1	3	243
Court of International Trade	2	0	0	0	2
Total	271	29	9	6	315

Source: CRS Judicial Nominations Database

- a. Does not include three confirmed nominations to the territorial district courts, whose judges are appointed to renewable 10-year terms. There are no nominees to the territorial district courts in the 110th Congress whose nominations are pending, were returned and have not been renominated, or were withdrawn.

¹⁰ Some of President Bush's nominees were nominated to a circuit or district judgeship more than once within a Congress, or nominated to the judgeship in more than one Congress. For a listing of these nominees, as well as other Presidents' nominees to the circuit and district courts whose nominations were resubmitted from 1977 through 2006, See CRS Report RL33839, *Returns and Resubmissions of Nominees to the U.S. Courts of Appeals and District Courts, 1977-2006*, by Kevin M. Scott.

Appendix I. The Appointment Process for Nominations to Article III Judgeships

Under the Constitution of the United States, the President and the Senate share the responsibility for filling vacancies in the federal judiciary.¹¹ While it is the President who nominates persons to fill federal judgeships, the appointment of each nominee also requires Senate confirmation. Although not mentioned in the Constitution, the Senate Judiciary Committee also plays an important role midway in the process — after the President selects, but before the Senate as a whole considers, the nominee. It is the Judiciary Committee in the Senate that has committee jurisdiction over most federal judicial nominations — namely, those to the Supreme Court, the courts of appeals, the district courts (including the territorial district courts), the U.S. Court of International Trade, and the U.S. Court of Federal Claims.¹²

The need for the President to make a nomination to an Article III court judgeship arises when a vacancy occurs on the court, due to the death, retirement, or resignation of a judge (or when a judge announces the intention to retire or resign).¹³ In considering judicial candidates for possible nomination, the President frequently receives recommendations from U.S. Senators. By longstanding custom, dating back to the mid-1800s, Senators of the President’s party have provided Presidents such advice, recommending candidates for judgeships situated in their states or linked by tradition to their states.¹⁴ Also by custom, Senators not of the President’s party play

¹¹ Article II, Section 2, clause 2 of the Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... 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....”

¹² Nominations to the Court of Appeals for the Armed Forces fall within the jurisdiction of the Senate Armed Services Committee; nominations to the U.S. Tax Court fall within the Jurisdiction of the Senate Finance Committee; and nominations to the Court of Appeals for Veterans Claims fall within the jurisdiction of the Senate Veterans’ Affairs Committee.

¹³ A vacancy also would occur if a judge were removed by Congress through the impeachment process, but historically such occurrences have been extremely rare. Specifically, in our nation’s history, “there have been 15 impeachment trials in the Senate, 11 against judges. Seven trials have resulted in convictions, all against judges.” CRS Report RL32935, *Congressional Oversight of Judges and Justices*, by Elizabeth B. Bazan and Morton Rosenberg.

¹⁴ A scholar on the Senate’s role in judicial appointments, writing in 1953, described 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 appeals, whose districts cover several states” Joseph P. Harris, *The Advice and Consent of the Senate* (Berkeley, CA: University of California Press, 1953; reprint, New York: Greenwood Press, 1968), p. 314, (page citations are to the reprint edition). See also, for more recent discussion of the continuing role played by Senators in recommending judicial candidates, Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through*

(continued...)

a consultative role and may convey to the President their views about candidates under consideration for judgeships in their states.¹⁵ The judgeships for which a Senator ordinarily recommends nominees, or is consulted, are those in the U.S. district court or courts which geographically fall within the Senator's state and the U.S. court of appeals circuit of which the Senator's state is a geographic part — provided the circuit judgeship historically has been associated with the Senator's state.¹⁶

After selecting someone to fill a judicial vacancy, the President formally submits a nomination in writing to the Senate.¹⁷ Usually on the same day it is received by the Senate, the nomination is referred to the Judiciary Committee. The committee's first formal public step is to hold a hearing on a nomination. The committee subsequently meets again to vote on whether to report the nomination to the full Senate. A committee vote to report (even a vote to report with an unfavorable recommendation) sends the nomination forward to be considered by the Senate as a whole, while a vote against reporting (historically, a very rare occurrence) prevents the nomination from going forward, and in effect defeats the nomination in committee. The final step in the appointment process occurs when the Senate votes to confirm or disapprove the nomination. A vote to confirm requires a simple majority of Senators present and voting. If the Senate votes in the negative on whether to confirm, the nomination is defeated, and a resolution of disapproval is forwarded to the President.

As with nominations in general, judicial nominations sometimes fail to advance through each procedural step in the appointment process. After referral to

¹⁴ (...continued)

Reagan (New Haven, CT: Yale University Press, 1997) (in each presidency chapter, under the heading "Senators and Selection").

¹⁵ 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 Elliot E. Slotnick, "A Historical Perspective on Federal Judicial Selection," *Judicature*, vol. 86, July-Aug. 2002, where, at p.13, the author observes that the blue slip procedure of the Senate Judiciary Committee "has worked to ensure that home state senators of both parties, whether or not they are of the president's party, have some say when judges are being nominated from their state."

¹⁶ A President is generally believed inclined to avoid selecting a judicial nominee opposed by a home-state Senator of the President's party — given the custom of "senatorial courtesy," wherein the Senate, as a collegial body, customarily supports Senators in disputes with the President over judicial appointments in their state. Two scholars have written that, as a result of this custom, Senators of the President's party "who object to a district judgeship in their home state have a virtual veto over the nomination." Robert A. Carp and Ronald Stidham, *Judicial Process in America*, 3d ed. (Washington: CQ Press, 1996), p. 247.

¹⁷ For a detailed examination of the procedures followed by Senate committees and the full Senate in considering nominations in general, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki. For a diagrammatic overview of procedures followed by the Senate Judiciary Committee and the full Senate in considering district and circuit court nominations, see CRS Report RS21735, *U.S. District and Circuit Court Nominations: A Diagram of Customary Procedures*, by Mitchel A. Sollenberger.

committee, a nomination might not receive a hearing or, after receiving a hearing, might not receive a committee vote on whether it should be reported. Even if favorably reported by committee, a nomination might not receive a vote by the Senate on whether to confirm. The majority leader might not schedule a vote, or some Senators might oppose taking such a vote and a “super-majority” of three-fifths of the full membership of the Senate would be needed to invoke cloture on the nomination.¹⁸ If a nomination fails to receive a Senate vote on confirmation, it ultimately will be either withdrawn by the President or returned to the President by the Secretary of the Senate upon a Senate adjournment or recess of more than 30 days.¹⁹ The Senate may, by unanimous consent, carry nominations over a recess of more than 30 days.

¹⁸ See CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer.

¹⁹ Rule XXXI, paragraph 6, *Standing Rules of the Senate*, provides, in part, 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.”