

## THE JUDICIAL APPOINTMENT PROCESS

BY MICHAEL A. FRAGOSO\*

*“What do you call a judicial nominee who only got 51 votes?”*

*“Your Honor.”*

The judicial appointment process ranks among the most contentious and consequential functions of the federal government. Given the federal courts’ exclusive constitutional role in resolving cases and controversies—including those involving controversial constitutional questions—judicial appointments command considerable attention from the White House, the Senate, and the media. This essay presents a comprehensive summary of that process based on the author’s time working on judicial nominations in the Office of the Senate Republican Leader, the committee on the Judiciary of the United States Senate, and the Office of Legal Policy at the U.S. Department of Justice.

In some ways this essay provides an update to Rachel Brand’s 2010 article, “A Practical Look at Federal Judicial Selection,”<sup>1</sup> which laid out a succinct and practical view of the judicial-selection process from the perspective of the Bush administration. Much has changed in the decade since. The exercise of the “nuclear option” to abolish the 60-vote cloture threshold for judicial nominees and the dilution of the blue-slip process for circuit nominees make it easier today to confirm some nominees over the objections of their home-state Senators. As a result of such watershed changes, some of Ms. Brand’s contentions, such as that “the likeliest way to become a judicial nominee is to be recommended to the President by a Senator,”<sup>2</sup> may no longer be true. While a Senator’s recommendation certainly does not *hurt* a nominee, the contemporary appointments process relies far less on the interests or opinions of individual Senators than it did two decades ago because individual Senators simply have fewer tools at their disposal to defeat non-preferred nominees when only a simple majority is needed to confirm them. This decline in the power over appointments today that individual Senators once wielded has accordingly eroded their relative bargaining power.

As the institutional power dynamics within the Senate have shifted over time, two major modern obstacles to confirmation have emerged: senatorial defections from within the

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<sup>1</sup> Rachel Brand, *A Practical Look at Federal Judicial Selection*, THE ADVOCATE (Winter 2010), <https://www.wilmerhale.com/-/media/c0cacbde8df34952959403f3df1abbfe.pdf>.

<sup>2</sup> *Id.* at 83.

President's party and the scarcity of time available on the Senate Floor. What matters most in this "post-nuclear age" of judicial appointments, then, is the ability of a presidential administration and Senate leadership to act in tandem to shepherd nominees through a labyrinthine nomination and confirmation process, steering clear of the landmines of intra-party opposition while still allowing adequate Floor time for their consideration. The purpose of this essay is to explain the intricacies of that process.

## I. CONSTITUTIONAL BACKGROUND

Two constitutional institutions exercise discretionary authority over judicial appointments: the President and the Senate. Article II of the Constitution prescribes the relevant process, vesting in the President the power to appoint judges with the "Advice and Consent of the Senate."<sup>3</sup> This has in time come to establish three constitutionally distinct and discretionary actions that constitute the modern judicial appointment process: nomination, confirmation, and appointment.<sup>4</sup> The President submits the nomination of candidates to the Senate, which then acts on that nomination either by confirming it or withholding its consent. A successful nomination returns to the President for appointment.

Because nomination, confirmation, and appointment are each discretionary steps of the process, the relevant actors have considerable power over their actions, including over their choice to undertake them in the first place. For example, the extent to which the Senate defers to and cooperates with the President depends considerably on current political relationships. In recent decades, the Senate has tended to work in conjunction with the President in the appointment process when the Senate and the President are of the same party. When there is divided government, on the other hand, the President is likelier to encounter a skeptical Senate that is less willing to exercise its confirmation power to further the President's judicial-appointment goals.<sup>5</sup> Even during united government, Senate rules, customs, and political considerations can result in the Senate's taking an active role contrary to presidential interests.<sup>6</sup> But since the abolition of the filibuster for nominations and the accompanying majority rule, the Senate's efforts to assert itself in a period of unified government must stem from the President's own party. In practice, therefore, such efforts ultimately become matters of caucus or conference management for the Senate Majority Leader.

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<sup>3</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>4</sup> Memorandum from Daniel L. Koffsky, Acting Deputy Assistant Att'y General, Office of Legal Counsel, U.S. DEP'T OF JUSTICE, *Appointment of a Senate-Confirmed Nominee*, Oct. 12, 1999 ("The Constitution thus calls for three steps before a presidential appointment is complete: first, the President's submission of a nomination to the Senate; second, the Senate's advice and consent; third, the President's appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary.").

<sup>5</sup> See Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About A Principle, Not A Person'*, NPR, Mar. 16, 2016, <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>; see also MITCH MCCONNELL, *THE LONG GAME* 259–268 (2019).

<sup>6</sup> See Neil A. Lewis, *Washington Talk; Democrats Readying for Judicial Fight*, N.Y. TIMES, May 1, 2001, <https://www.nytimes.com/2001/05/01/us/washington-talk-democrats-readying-for-judicial-fight.html> ("What we're trying to do is set the stage and make sure that both the White House and the Senate Republicans know that we expect to have significant input in the process," Senator Charles E. Schumer, New York's senior Democrat, said in an interview. "We're simply not going to roll over.").

## II. THE NOMINATION PROCESS

The nomination process begins when the White House receives word of a judicial vacancy. When a federal judge<sup>7</sup> decides to retire or elect senior status,<sup>8</sup> he sends a letter to his Chief Judge, the Administrative Office of the U.S. Courts (AO), and the President, informing them of his decision. The letter can either inform the addressees of an impending move from active status on a certain date or “upon confirmation and appointment of a successor.”<sup>9</sup> Judges today tend to choose transition “upon confirmation.” At any time before the event that triggers the vacancy—either the dawn of the specified date or the appointment of a successor—a judge can elect to rescind his decision to retire or transition to senior status.<sup>10</sup>

When the White House receives the retirement letter, it begins to identify possible replacements. Typically, a White House already has identified a field of candidates for vacancies it suspects are likely, so it rarely starts painting on a blank canvas. Few vacancies come as surprises: judges are eligible for senior status when they satisfy “the rule of 80,” i.e., when their age over 65, plus their years of service, equals 80.<sup>11</sup> Every White House tends to begin its administration knowing which judges fit that bill, and plans accordingly. It is also not uncommon for there to be conversations between the White House and eligible judges, either directly or through intermediaries.<sup>12</sup>

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<sup>7</sup> The principles here largely apply to all federal judicial appointments. I will use “judge” when speaking generally and specify any material process differences that apply to Supreme Court appointments.

<sup>8</sup> See 28 U.S.C. § 371; see also Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533 (2007). Senior status is often described as a “semi-retirement” in which judges are relieved of the responsibilities of active status on their court. It’s frequently a misnomer to call this “retirement” because the vast majority of senior-status judges continue to hear cases, frequently with full dockets. They can, however, elect to reduce their caseloads—with a concomitant reduction in support staff like law clerks. In the case of district judges, senior status often allows them to focus on types of cases that they find interesting (e.g., hearing more civil cases or avoiding administrative appeals). The practical effects on circuit judges are more significant because senior status removes them from the *en banc* court absent unusual circumstances (like having participated in the panel decision being appealed), and it typically prevents them presiding over panels and thereby assigning cases among panel members. It should be noted, though, that increasingly the election of senior status does not necessarily preclude participation in the *en banc* process, even if it typically does prevent the judge from sitting *en banc* on the merits. See, e.g., *Kennedy v. Bremerton School Dist.*, 4 F.4th 910, 930 (O’Scannlain, J., statement regarding denial of rehearing *en banc*).

<sup>9</sup> See, e.g., Letter from Ilana Diamond Rovner to Joseph R. Biden, Jr., Jan. 12, 2024, <https://www.scribd.com/document/699170977/01122024rovner-Letter> (“I write to inform you that, having attained the age and service requirements in 28 U.S.C. § 371(b)(1), I intend to leave active service and assume senior status upon the confirmation and appointment of my successor.”).

<sup>10</sup> See, e.g., Amanda Robert, *4th Circuit judge rescinds plan to take senior status*, ABA JOURNAL, Nov. 29, 2021, <https://www.abajournal.com/news/article/4th-circuit-judge-rescinds-plan-to-take-senior-status>; Jenna Greene, “Bewilderment” from Latino leaders after federal judge rescinds senior status, REUTERS, Aug. 15, 2022, <https://www.reuters.com/legal/government/bewilderment-latino-leaders-after-federal-judge-rescinds-senior-status-2022-08-15/>.

<sup>11</sup> 28 U.S.C. § 371(c).

<sup>12</sup> See Michael A. Fragoso, *The Judge’s Role in Choosing a Successor*, Address at the Federalist Society’s National Lawyers Convention, Nov. 12, 2022, <https://www.youtube.com/watch?v=h2SGAEmiVM0>. Of course, such conversations carry potential political risks. See Statement of Senator Marsha Blackburn on the Nomination of Kevin Ritz, Mar. 20, 2024, <https://www.blackburn.senate.gov/2024/3/blackburn-statement-on-the-nomination-of-kevin-ritz-to-the-sixth-circuit> (“Senator Hagerty and I were assured that there was no backroom deal in advance of the search, but the White House mysteriously abandoned their superficial deliberations with my office and today announced their nomination of Mr. Ritz to serve on the Sixth Circuit.”).

Primary responsibility for selecting possible candidates falls to the White House Counsel's Office (WHCO), where the day-to-day work of judicial appointments is usually entrusted to a Deputy or Senior Associate Counsel. Depending on the administration, the Counsel's Office may also work with the Department of Justice's Office of Legal Policy (OLP) in identifying candidates.

Initial internal candidates can come from anywhere, but they typically come from a roster of lawyers known to those involved in the selection process. Outside organizations of lawyers may also help identify names, but the efficacy of such advocacy depends considerably on the internal dynamics of WHCO, which ultimately retains control over the process.

As the White House considers and evaluates candidates, it will communicate with the home-state Senators for the judicial vacancy. In the case of district judges, these Senators have functional veto power via the blue-slip process, so their input is critical. In the case of circuits, most recent Judiciary Committee chairmen have viewed consultation as important but not dispositive because the President is generally afforded more authority over circuit appointments on account of their multistate significance. Consequently, WHCO will still discuss possible candidates with home-state Senators but is likely to focus on internally approved candidates for circuit appointments.

There is no fixed rule for how Senators identify names for vacancies. Some Senators set up commissions to evaluate nominees, while others do not. Some commissions recommend ratios of candidates based on political formulas (e.g., two Democrats to one Republican) while others try to find seemingly apolitical candidates like sitting magistrate judges. Some Senators simply know whom they want and negotiate directly with the White House. Regardless of how candidates originating in the Senate are found, WHCO will prefer to receive two or three names to hedge against any preferred nominee failing to clear a background investigation or other prerequisite of appointment. In reality, no administration likes being forced to pick from a field of one if it can be at all avoided.

As candidates are identified, they are invited to the White House for interviews. Some administrations require these to be in person while others do not. The extent to which the Department of Justice participates in these interviews also varies across administrations, with the trend being that the Department—and OLP—are more involved in Republican administrations and less involved in Democratic ones. The interviews are typically substantive, with different administrations focusing on different kinds of questions. The interview also includes a private discussion with clearance counsel<sup>13</sup> about potentially disqualifying personal information for use in pre-selection vetting.

Once the candidates have been interviewed, WHCO will decide on a subset of candidates to put through full vetting. WHCO initiates that process by instructing OLP and the FBI to investigate the candidate. It will often—but not always—give Senators advance notice of the decision to commence investigation of a candidate lest the Senators find out unceremoniously through their own channels as OLP is making phone calls and the FBI is investigating in the field. Because the process is resource-intensive—for both OLP and the FBI—it is rare, albeit not

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<sup>13</sup> The WHCO and the Presidential Personnel Office typically rely on specialized counsel to vet candidates for office for their suitability.

unheard of, to put multiple candidates through background investigation simultaneously for one vacancy.

At this point, OLP will assign the candidate a “vetter,” who assists the candidate in assembling his Senate Judiciary Questionnaire (SJQ), which typically forms the basis of the OLP vet. The vetter proceeds to evaluate the candidate based on the SJQ’s contents, the candidate’s public record, and phone calls to the candidate’s associates. The vetter then produces a memo on the candidate, which is sent to the White House, often upon the approval of the Attorney General.<sup>14</sup>

While the OLP vet is underway, the FBI performs a background investigation (BI) on the candidate. The timing of a BI varies considerably based on resource availability and relative priority but usually takes at least a month. OLP checks the BI for completeness, red flags, and confirmation of biographical information, upon which it informs WHCO that the BI is complete. Issues that can come up in BIs can be minor (unpaid taxes, disputes with neighbors) or severe (lying to authorities, hostile work environments). They may be anachronistic concerns (racially restrictive covenants on real property), or their importance may depend on the inclinations of the Chairman of the Judiciary Committee (youthful drug experimentation). Importantly, the vet and the BI proceed independently of each other so that two sets of eyes are looking for material concerns at the same time.

Once WHCO has studied the vet memo and the BI report, it can decide whether to recommend to the President that the candidate be nominated. Because formal nominations can only be received by the Senate when it is in session, WHCO almost always announces an “intent to nominate” by issuing a press release that names the nominee and provides his biographical information. Once the Senate is in session, the White House Executive Clerk will transmit the official nomination to the Senate, identifying the nominee, his home State, and noting (“vice”) whom he will be replacing.<sup>15</sup> The nomination will then be referred to the Judiciary Committee.

### III. THE CONFIRMATION PROCESS

The judicial confirmation process goes through the Senate Judiciary Committee, which proceeds in accordance with established precedents and customs. Of note, the confirmation process does not necessarily start with the formal nomination but with the Committee’s receipt of a set of necessary documents.

Once a nominee is announced, OLP transmits to the Committee majority and minority the nominee’s SJQ and voluminous attachments. The SJQ is a negotiated document that asks questions about the nominee’s professional background and requires the nominee to provide articles, presentations, public statements, notable litigated cases, reversals (if a sitting judge), affiliations, and the like. It consists of a public portion, which includes professional information

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<sup>14</sup> Depending on the administration, these memos can take different forms. They may be deliberative, aimed at providing decisionmakers with frank advice about whether this candidate is a good fit for the position. Or, they may be defensive, flagging for decisionmakers the candidate’s likely political liabilities so that the administration is prepared to counter attacks once the nomination is public. WHCO indicates to OLP which form(s) it expects the memo to take.

<sup>15</sup> An example of what the nomination form says: “To the Senate of the United States. I nominate Steven J. Menashi, of New York, to be United States Circuit Judge for the Second Circuit, vice Dennis G. Jacobs, retired.”

and a net worth statement, and a confidential portion involving personal background issues like criminal history and financial details. The public portion is supposed to be available to the public, while the confidential portion is protected by committee confidentiality and is only available to Committee staff. In the case of Supreme Court nominations, a different SJQ is negotiated between the majority and the minority at the outset of each Supreme Court vacancy.<sup>16</sup>

OLP also arranges a time to provide the Committee with BI reports. The review of BIs is strictly controlled by WHCO and restricted to Senators and very select staff for the majority and minority. Those staff members discuss issues raised in the BI with the nominee and decide whether to clear the nominee's background for a hearing. If the Committee refuses to clear a nominee based on issues in the BI, the nominee can opt to have a "closed hearing" to discuss the issues or waive confidentiality on the issues to allow discussion in an open session.

OLP also gives the Committee access to nominees' financial disclosure forms, prepared in conjunction with the AO, within around a week of the confirmation hearing. These financial disclosures are public information and can receive some press.

The timeline of a confirmation hearing follows the "28-day rule." Under Committee practice, a nominee's hearing is "ripe" 28 days after his SJQ has been received by the Committee. Note that it is not 28 days after nomination, so it is not unheard of to receive a formal nomination only a day or two before the hearing. Although the so-called 28-day rule is generally observed it is only a customary practice and not a rule per se; it can be excused under such exigent circumstances as a Supreme Court vacancy.<sup>17</sup>

Hearings are noticed under Committee rules one week before they occur. Only the fact of the hearing needs to be noticed; the identities of witnesses are not announced until the final slate is settled, which can take up to, and including, the day before the hearing. In order to be listed for a hearing, therefore, a nominee must have (1) his paperwork in for at least 28 days, (2) a clear BI, and (3) two positive blue slips if being nominated to a district judgeship.

All judicial nominees to district and circuit courts resident in States receive blue slips. These are blue-colored forms that are distributed by the Chairman to home-state Senators asking for their views on the nominee. Home-state Senators can choose to return the slips recommending a hearing, to return them recommending a hearing but declining to commit to support of the nominee, to return them opposing a hearing, or refuse to return them at all. A home-state Senator's negative blue slip or the failure to return one prevents a district-court nominee from having a hearing. Whether a negative or unreturned blue-slip prevents a circuit-court nominee from having a hearing is a question for the judgment of the Chairman.

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<sup>16</sup> For example, Supreme Court candidates need to provide citations for all "opinions, dispositive orders, and orders affecting injunctive relief" that they have authored as well as citations to all panel opinions in which they participated. Compare Amy Coney Barrett questionnaire following nomination to the U.S. Court of Appeals for the Seventh Circuit, [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf), with Amy Coney Barrett questionnaire following nomination to the Supreme Court of the United States Question 13, [https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20\(Public\)%20\(02\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(02).pdf).

<sup>17</sup> For example, then-Judge Amy Coney Barrett returned her SJQ to the Committee on September 26, 2020, and her hearing was noticed for October 12, 2020—16 days later.

The decision on when to hold hearings and which nominees to list for hearings is entirely committed to the discretion of the Chairman. In recent years, the practice has been to have six slots available in a hearing. This could be one circuit-court nominee on the first panel and up to five lower-court or executive-branch nominees on the second panel,<sup>18</sup> or just six lower-court or executive branch nominees on one panel.<sup>19</sup> Since 2017, when the Committee has considered two circuit-court nominees, the second panel usually drops a slot, leaving two circuit-court nominees on the first panel and three lower-court or executive-branch nominees on the second panel.<sup>20</sup> The Committee has occasionally considered more than six nominees, but only with the consent of the minority.<sup>21</sup>

Hearings are traditionally held at least two weeks apart. While the Chairman could hold them more frequently in his discretion, this has not been done recently without the consent of the minority. Hearings are also almost always held while the Senate is in session, although that is not required by rule.<sup>22</sup>

Around the time of a hearing, the American Bar Association's (ABA) Standing Committee on the Federal Judiciary issues ratings for nominees. The ABA's process has changed over the years, for decades having held a privileged position of rating nominees before the President nominated them. During the Bush Administration, they were cut out of this process due to perceived political bias. The ABA was restored to its privileged position by the Obama administration, only to get cut out yet again by the Trump administration. It has remained an outsider since. When a nominee is announced, OLP transmits the SJQ and bar waivers to the ABA so they can investigate the nominee's standing in all jurisdictions in which he is admitted. The ABA Standing Committee then finds the nominee "Well Qualified," "Qualified," or "Not Qualified." If the nominee is "Not Qualified," a written report accompanies the decision.<sup>23</sup>

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<sup>18</sup> See, e.g., Hrg. of the Senate Judiciary Comm., Oct. 4, 2017 (on the nominations of Stephanos Bibas, Liles Clifton Burke, Michael Joseph Juneau, A. Marvin Quattlebaum, Jr., Tilman Eugene Self III, and John C. Demers); Hrg. of the Senate Judiciary Comm., May 26, 2021 (on the nominations of Tiffany P. Cunningham, Margaret Irene Strickland, David H. Chipman, Ur Mendoza Jaddou, Anne Milgram, and Kenneth Allen Polite, Jr.).

<sup>19</sup> See, e.g., Hrg. of the Senate Judiciary Comm., June 24, 2020 (on the nominations of David W. Dugan, Hala Y. Jarbou, Iain D. Johnston, Stephen P. McGlynn, Franklin Ulyses Valderrama, and Roderick C. Young); Hrg. of the Senate Judiciary Comm., Nov. 30, 2022 (on the nominations of Jonathan James Canada Grey, Julia E. Kobick, Rita F. Lin, Raymond Ernesto Reyes, Jr., James Edward Simmons, Jr., and Amy Lefkowitz Solomon).

<sup>20</sup> See, e.g., Hrg. of the Senate Judiciary Comm., Sept. 6, 2017 (on the nominations of Amy Coney Barrett, Joan Louise Larsen, Eric S. Dreiband, William L. Campbell, Jr., and Thomas Lee Robinson Parker); Hrg. of the Senate Judiciary Comm., Apr. 28, 2021 (on the nominations of Ketanji Brown Jackson, Candace Jackson-Akiwumi, Julien Xavier Neals, Zahid N. Quraishi, and Regina M. Rodriguez); *but see* Hrg. of the Senate Judiciary Comm., Sept. 7, 2022 (on the nominations of Cindy K. Chung, Tamika R. Montgomery-Reeves, Kelley Brisbon Hodge, John Frank Murphy, Mia Roberts Perez, and Kai N. Scott) (noticed without consent of the minority); Hrg. of the Senate Judiciary Comm., Sept. 21, 2022 (on the nominations of Maria Araújo Kahn, Julie Rikelman, Margaret R. Guzman, Araceli Martínez-Olguín, Jamar K. Walker, and Jamal N. Whitehead) (same).

<sup>21</sup> See, e.g., Hrg. of the Senate Judiciary Comm., Aug. 1, 2018 (on the nominations of Richard J. Sullivan, Diane Gujarati, Eric Ross Komitee, John L. Sinatra, Jr., Rachel P. Kovner, Lewis J. Liman, and Mary Kay Vyskocil); Hrg. of the Senate Judiciary Comm., June 8, 2022 (on the nominations of Carlton W. Reeves, Laura E. Mate, Claire McCusker Murray, Luis Felipe Restrepo, Claria Horn Boomed, John Gleeson, and Candice C. Wong).

<sup>22</sup> During divided government, hearings tend to stop in the summer of election year. Referred to as the Thurmond Rule by then-Chairman Leahy when he applied it in 2008 and then the Thurmond-Leahy Rule by then-Chairman Grassley in 2016, it likely doesn't hold with unified government.

<sup>23</sup> See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, *What It Is and How It Works*, [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/fjc-backgroundunder.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fjc-backgroundunder.pdf).

The confirmation hearings themselves take place before the Judiciary Committee. The Chairman or his designee presides over them, and they have one or two panels. Current practice is for circuit nominees and district nominees to appear on separate panels, and no more than six nominees will appear at one hearing absent consent of the minority.<sup>24</sup> How nominees are prepared for their hearings depends on the administration: in some cases, preparation is kept within WHCO, while in others it is managed by OLP. Nominees are often introduced at their hearings by their home-state Senators.

Supreme Court hearings are very different; they span the course of a whole week. In recent decades, the Committee has convened on a Monday to give all members a chance to make opening statements and to hear from the nominee and his or her introducers. The Committee then convenes on Tuesday for long periods of questioning by each Committee member, followed by shorter periods of questioning by each member on Wednesday, after which the Committee meets in closed session to be briefed on the nominee's BI. On Thursday, the Committee hears from the ABA in person—usually the evaluator and the Chairman of the Standing Committee—as well as panels of outside witnesses chosen by the majority and the minority to make the case for and against the nominee.

After the hearing, members have a fixed amount of time in which to submit written questions for the record (QFRs) to the nominee. For mine-run confirmations the QFR deadline for members is a week, while for Supreme Court nominations the expected turnaround time is considerably shorter. Nominees then answer these questions with the assistance of OLP and return them to the Committee so that the nomination can be considered in executive session—that is a meeting of the Judiciary Committee to transact business, also known as a “markup.”

The Chairman, absent consent, needs to notice any meeting of the committee in executive session three days in advance.<sup>25</sup> Markups are usually held on Thursday mornings, so if nominees get their QFRs in on the Monday after they receive them, they can then be listed on the markup notice Monday evening. Under Committee rules, any member may ask for a nomination to be “held over” for a week so the Committee can consider it further.<sup>26</sup> This happens for almost all nominees as a matter of course, so the first markup for a nominee exists simply to “burn the hold.” Following that first markup, the Chairman will typically announce the next markup to take place a week later, at which session the nominees will be voted out.

There are three noteworthy procedural wrinkles in the vote to report out a nominee. The first involves proxy votes. Senate Rule XXVI requires a concurrence of a majority of the members who are present to report out a nominee and establishes some restrictions on proxy voting even when allowed.<sup>27</sup> Because the Judiciary Committee allows proxy voting, the Senate Parliamentarian has

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<sup>24</sup> The standard configurations are one circuit and up to five districts, two circuits and up to three districts, or up to six districts.

<sup>25</sup> See Senate Judiciary Comm. R. I.1.

<sup>26</sup> See Senate Judiciary Comm. R. I.3.

<sup>27</sup> See Senate R. XXVI.7(a)(3) (“The vote of any committee to report a measure or matter shall require the concurrence of a majority of the members of the committee who are present. No vote of any member of any committee to report a measure or matter may be cast by proxy if rules adopted by such committee forbid the casting of votes for that purpose by proxy; however, proxies may not be voted when the absent committee member has not been informed of the matter on which he is being recorded and has not affirmatively requested that he be so recorded.”).

interpreted this to mean in practice that only *negative* proxy votes count. This means that reporting out a nominee successfully requires there to be more votes in favor *physically present* in the committee meeting room than the combination of negative votes cast in person and by proxy. Therefore, in a closely divided Senate, party-line votes require each member of the majority to be present, and the majority always needs to ensure that it has enough present affirmative votes to vote out the nominee successfully.<sup>28</sup> Given the competing demands on Senators' time—constituent meetings, interviews, competing hearings, votes—and the tradition of full debate in the Committee,<sup>29</sup> maintaining full attendance by the majority can be difficult. A common practice by the minority is to speak at length about nominees—knowing that they can stagger their attendance because their proxy votes in the negative count—thereby forcing the majority to wait to vote in the hopes that competing obligations will force a member of the majority to forego its quorum.

The second procedural wrinkle involves the so-called “cleansing clause” of the Senate Rules. Under the Standing Rules of the Senate, a vote by a committee majority present and voting serves to ratify all previous actions taken by that committee and forecloses any points of order against the measure or matter on the Floor.<sup>30</sup> Thus, in the case of a particularly controversial nomination, the majority will want to ensure the applicability of the cleansing clause to protect the nomination on the Floor and therefore have an actual majority present and voting out the nomination.<sup>31</sup>

The third wrinkle is the so-called “two-hour rule.” Under the Senate Rules, no Committee—other than the Committees on the Budget and Appropriations—can meet later than two-hours after the Senate opens or after two o'clock, absent consent.<sup>32</sup> Because markups usually begin at

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<sup>28</sup> See Tiana Headley, *Senate Returns Two District Court Nominations to Judiciary Panel*, BLOOMBERG LAW (Nov. 14, 2023), <https://news.bloomberglaw.com/us-law-week/senate-returns-two-district-court-nominations-to-judiciary-panel>.

<sup>29</sup> Under Committee Rules, debate cannot end absent a vote by the majority of the Committee—including one vote from the minority—which theoretically allows for an indefinite filibuster by a unified minority. See Senate Judiciary Comm. R. IV (“The Chair shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with eleven votes in the affirmative, one of which must be cast by the minority.”).

<sup>30</sup> See Senate R. XXVI.7(a)(3) (“Action by any committee in reporting any measure or matter in accordance with the requirements of this subparagraph shall constitute the ratification by the committee of all action theretofore taken by the committee with respect to that measure or matter, including votes taken upon the measure or matter or any amendment thereto, and no point of order shall lie with respect to that measure or matter on the ground that such previous action with respect thereto by such committee was not taken in compliance with such requirements.”).

<sup>31</sup> During the Barrett confirmation a point of order was raised against the nomination because a quorum was not present under Committee Rules to report out her nomination. Democrats boycotted the markup and Committee Rules—R. III.1—require at least two members of the minority to transact business. The Presiding Officer ruled that the point of order did not lie under the “cleansing clause” because a majority of the Committee had been present and voting affirmatively to report her nomination. An appeal of this ruling was tabled. See Vote No. 220, 116th Cong., 2d Session (On the Motion to Table the Appealing of the Ruling of the Chair).

<sup>32</sup> See Senate R. XXVI.5(a) (“Notwithstanding any other provision of the rules, when the Senate is in session, no committee of the Senate or any subcommittee thereof may meet, without special leave, after the conclusion of the first two hours after the meeting of the Senate commenced and in no case after two o'clock postmeridian unless consent therefor has been obtained from the majority leader and the minority leader (or in the event of the absence of either of such leaders, from his designee). The prohibition contained in the preceding sentence shall not apply to the Committee on Appropriations or the Committee on the Budget.”)

ten o'clock and the Senate often convenes at ten o'clock, this means that a markup can be stopped at noon by the minority.<sup>33</sup>

Once the markup has successfully reported out the nominee, the Committee transmits the nomination papers to the Senate Floor, where the nominations are placed on the Senate Executive Calendar for consideration by the full Senate. There, the majority and the minority consult their members to see if any Senators object to setting a time to vote to confirm the nomination.<sup>34</sup> On the Republican side, this entails running a "hotline" whereby each Senator's office is asked whether it consents to setting a timing agreement for the nominee. The Democratic process is less uniform but still results in the Democratic Leader being able to convey whether the Democratic Caucus will agree to a deal or whether he or one of his Members will hold it. In contemporary practice, there is almost always at least one such "hold" on a nomination. While deals can occasionally be struck to reach a timing agreement on nominees supported by the minority, those are increasingly few and far between. It rather falls to the Majority Leader to find time in the Senate schedule during which to file cloture on the nominations and end debate on them.

The Majority Leader files cloture on a nominee, signaling a potential end to debate.<sup>35</sup> The cloture petition—signed by 16 Senators—lays over for an intervening day after which cloture can be invoked. Following the rule change in 2013, cloture is invoked by a simple majority for judicial nominees. Following the invocation of cloture, there is either a thirty-hour (for circuits) or a two-hour (for districts) period of post-cloture time that needs to run before a final confirmation vote can take place.<sup>36</sup> If the nomination receives the assent of a majority of those Senators present and voting, it is confirmed. The Senate clerk then transmits the confirmed nomination back to the White House.

#### IV. THE APPOINTMENT PROCESS

Perhaps the least commonly understood component of the judicial appointment process is the actual appointment by the President. Once a nominee has been confirmed by the Senate, the last remaining action is appointment, whereby the President signs the confirmed nominee's commission, delivers it to the nominee, and thereby completes the constitutional process.

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<sup>33</sup> See Exec. Bus. Mtg. of the Senate Judiciary Comm., Jan. 31, 2017 (using the two-hour rule to end the markup on the nomination of Jefferson B. Sessions to be Attorney General); Exec. Bus. Mtg. of the Senate Judiciary Comm., Nov. 30, 2023 (using the two-hour rule to end the markup on the authorization of subpoenas against Harlan Crow and Leonard Leo); see also *Democrats Unsuccessfully Try to Authorize Subpoena in Latest Attempt to Discredit Supreme Court*, Senate Judiciary Committee Republicans, Nov. 30, 2023, <https://www.judiciary.senate.gov/press/rep/releases/democrats-unsuccessfully-try-to-authorize-subpoena-in-latest-attempt-to-discredit-supreme-court> (explaining procedural defects in the subpoena, including the violation of the two-hour rule).

<sup>34</sup> A hotline is a request sent out to all Senators seeking unanimous consent for consideration of a provision.

<sup>35</sup> In order to do this the Senate needs to be in Executive Session—opposed to Legislative Session—but consent to move to proceed to Executive Session is provided as a matter of course. Forcing a vote to go into Executive Session is a tactic that is reserved for unusual circumstances when the minority wants to make a particular point by drawing out the process. See, e.g., Vote No. 217 (116th Cong., 2d Session) (on the Motion to Proceed to Executive Session to Consider the Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States)

<sup>36</sup> The time for both was 30 hours until a ruling of the Chair in 2019 during the confirmation of Judge Roy Altman (S.D. Fla.) reduced the post-cloture time required for district judges two hours. See Vote No. 61 (116th Cong., 1<sup>st</sup> Session) (on the Decision of the Chair). A contemporaneous ruling made the same change for subcabinet appointments. See Vote No. 59 (116th Cong., 1<sup>st</sup> Session) (on the Decision of the Chair).

Appointments do not necessarily happen immediately. Various factors can cause nominees' appointments to be delayed after confirmation. For example, the seat might not yet be vacant.<sup>37</sup> Or the nominee might have legal work to wind down in his practice before assuming the bench. Or the nominee might need to move to the area in which he expects to establish chambers. Regardless, this is all coordinated between WHCO and OLP, with the Executive Clerk also checking to ensure that the appointment is properly made.<sup>38</sup>

Once all these issues are cleared up and the nominee is appointed, he is ready to take the oaths of office (there are two: one constitutional, the other statutory) and assume the duties of a federal judge. Until, one day, he sends a letter to his Chief Judge, the AO, and the President informing them of his imminent retirement and thereby sets off the process that once was set off on him.

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<sup>37</sup> This has not stopped President Biden, who appointed Justice Ketanji Brown Jackson prior to Justice Stephen Breyer's retirement, on the advice of the Office of Legal Counsel. See Memorandum from Christopher H. Schroeder, Assistant Att'y General, Office of Legal Counsel, U.S. DEP'T OF JUSTICE, *Authority of the President to Prospectively Appoint a Supreme Court Justice*, Apr. 6, 2022. The constitutional problems presented by that decision are beyond the scope of this Essay. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>38</sup> For example, a nominee confirmed to a seat that has been eliminated by statute as a "temporary" judgeship, cannot be appointed. While this has not happened in recent memory, it is one of the issues for which the Executive Clerk stands on guard.