

# CRS Report for Congress

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## U.S. District and Circuit Court Nominations: A Diagram of Customary Procedures

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### Summary

The confirmation process for U.S. district and circuit court nominations is based on guidelines set forth by the Constitution. Article II, Section 2, provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court...” More specifically, Senate Rule XXXI regulates the proceedings on all nominations in executive session. Each Senate committee, however, may adopt its own procedures as long as they do not conflict with Senate rules.

This report summarizes both the informal and formal rules for reviewing lower court judicial nominations. In addition, a diagram at the end of the report highlights the customary procedures for the confirmation process, to which there might be exceptions related to a specific nomination. Senate and Senate Judiciary Committee actions on judicial nominations are discussed more generally in CRS Report RL31635, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*, by Denis Steven Rutkus and Mitchel A. Sollenberger. This report will be updated as events warrant.

When a federal court vacancy occurs, the President traditionally consults Senators of the home state where there is a vacant judgeship, especially if they are of the same political party as the President.<sup>1</sup> The President selects a nominee and submits a nomination to the Senate.

Judicial nominations are referred to the Committee on the Judiciary. The committee sends a committee questionnaire and financial disclosure forms to nominees, and may, at the discretion of the committee chair, invite the American Bar Association to review nominees’ qualifications.

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<sup>1</sup> In rare cases the President may select a nominee that is not from the previous judge’s home state. For example, President George W. Bush nominated Claude Allen of Virginia to replace Francis D. Murnaghan Jr. of Maryland on the Fourth Circuit Court of Appeals.

A nominee's home-state Senators are consulted by the Judiciary Committee through the use of a committee form called a "blue slip," which asks whether the Senators approve or disapprove of the nomination. As a matter of recent policy, the committee does not wait indefinitely for the return of "positive blue slips"; in practice, committee action on a judicial nomination is unlikely if the President failed to consult with the home-state Senators.<sup>2</sup> The question of whether committee action will move forward with one or two "negative blue slips" depends on the chair's blue-slip policy during a Congress.

When the questionnaire and financial disclosure forms are returned, the chair determines whether to hold a hearing.<sup>3</sup> Following a hearing, the Judiciary Committee may vote on whether to report the nomination to the full Senate. In rare cases, a Judiciary Committee chair has forgone a hearing on a nomination and proceeded to a committee vote.<sup>4</sup> If a vote occurs, the committee may choose to vote on a motion to table the nomination, to report the nomination favorably, to report the nomination without recommendation, or to report the nomination unfavorably. If a majority of the committee members present vote to report favorably, without recommendation, or unfavorably, the nomination moves to the Senate floor. If a majority votes either to table the nomination or in the negative on the other motions, then the nomination remains in committee.

Once the nomination is reported out of committee, the Senate may consider and vote on it. If the Senate votes on the nomination, it may vote to confirm, reject, table, or recommit. If the Senate votes to confirm or reject a nomination, either a resolution of confirmation or one of disapproval, respectively, will be transmitted by the Secretary of the Senate to the President. In the case of a vote to table, the nomination is returned to the President. A vote to recommit sends the nomination back to committee. The Senate's vote on confirmation of a nomination can be delayed or prevented if a Senator or group of Senators chooses to place a hold on or filibuster the nomination.

Either the Judiciary Committee or the Senate can decide not to act on a judicial nomination.<sup>5</sup> If no final action is taken on a nomination, it ultimately will be withdrawn by the President or be returned to the President by the Senate upon an adjournment or recess of more than 30 days.<sup>6</sup>

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<sup>2</sup> For further reading, see CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger; and CRS Report RS21674, *The Blue-Slip Process in the Senate Committee on the Judiciary: Background, Issues, and Options*, by Mitchel A. Sollenberger.

<sup>3</sup> Rule 26(3) also provides a process by which committee members may obtain a committee meeting.

<sup>4</sup> For example, during the 95<sup>th</sup> Congress the Judiciary Committee reported district court nominee Harold L. Murphy to the Senate without holding a hearing.

<sup>5</sup> Although unusual, Senate Rule XVII allows for the committee to be discharged from further consideration of a nomination. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 943-944.

<sup>6</sup> Occasionally, the President appoints a federal judge during a recess of Congress. Such recess appointments are infrequent and fall outside the scope of this report. For further reading, see (continued...)

For further information on the structure of the confirmation process, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki; and CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

For a further description of the Senate Judiciary Committee's blue-slip policy, see CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger; and CRS Report RS21674, *The Blue-Slip Process in the Senate Committee on the Judiciary: Background, Issues, and Options*, by Mitchel A. Sollenberger.

For information concerning tracking and statistical data on U.S. district and circuit court nominations, see CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107<sup>th</sup> and 108<sup>th</sup> Congresses*, by Denis Steven Rutkus and Mitchel A. Sollenberger; CRS Report RL31635, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*, by Denis Steven Rutkus and Mitchel A. Sollenberger; and CRS Report RL32122, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1945-1976*, by Mitchel A. Sollenberger.

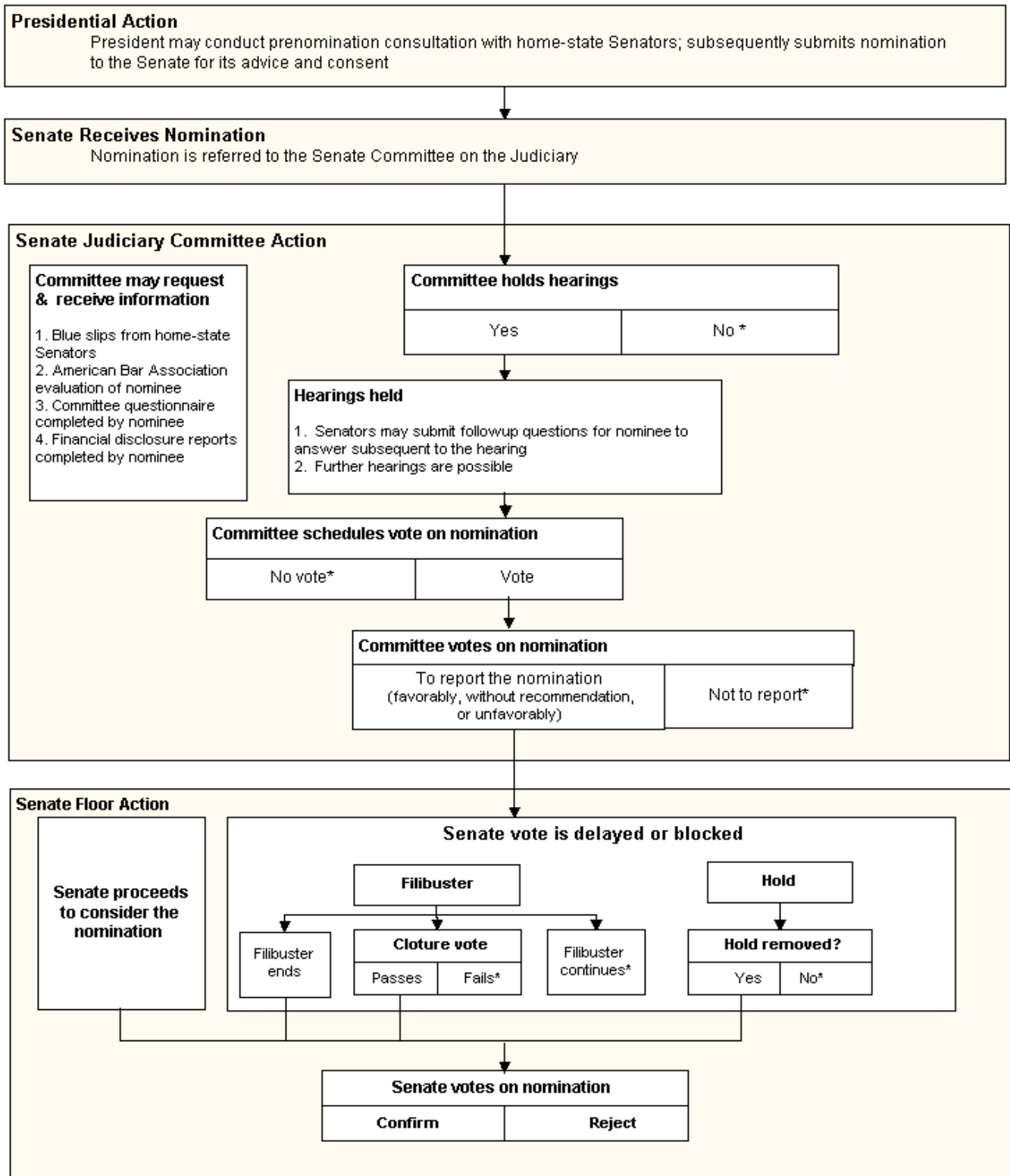
For an analysis of the use of filibusters and holds to delay or prevent Senate action on legislative or executive business, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach; and CRS Report 98-712, *"Holds" in the Senate*, by Walter J. Oleszek.

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<sup>6</sup> (...continued)

CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher; and CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry Hogue.

**Figure 1. U.S. District and Circuit Court Nominations: Customary Procedures for Senate Advice and Consent**



\* Rule 31 (6) provides that, if the Senate adjourns or recesses for more than 30 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.”

Source: Congressional Research Service.