

Judicial Policy

Prevent Federal Court Nomination Battles

De-Escalating the Conflict over the Judiciary

Background

The process of nominating and confirming federal judges has become infected by the polarization that characterizes much of U.S. politics. Confirmation rates have plummeted, and long delays are commonplace. Presidents and senators of both parties, egged on by interest groups, see the effects of judicial decisions in hot-button policy areas and thus battle to control the judiciary's make-up.

The heated selection process harms the courts by creating extended vacancies, scaring off good candidates, and posing a threat to judicial impartiality and independence. And, it harms the presidency and Senate by drawing attention away from important policy issues and locking the President and senators into contentious positions.

Recommendations

Two changes to deal with this problem are the use of *bipartisan commissions* to aid in the selection and screening of appeals court and district court nominees, and a *timetable* to prevent delays.

With respect to bipartisan commissions, the next President should:

- Create a bipartisan appellate judge nominating commission and give priority consideration to candidates the commission recommends, with the understanding that the President will strongly prefer members of his or her party
- Urge all senators to appoint bipartisan district judge nominating commissions and give priority consideration to candidates jointly recommended by the same-state senators and their commissions, with the understanding that the President will strongly prefer members of his or her party
- Consult in good faith with the bipartisan leadership of the Senate and Senate Judiciary Committee before making nominations and
- Urge the Senate to comply with pre-established time limits for hearings and floor votes on nominees endorsed by bipartisan nominating commissions and whose nominations followed good-faith White House consultation with the leadership.



A timetable should include:

- Early announcement of retirements, with judges providing a year's advance notice of their intention to leave active judicial service
- Expeditious nominations, with the President submitting nominations to the Senate within 180 days of receiving notice of an impending vacancy
- Timely hearings, conducted by the Senate Judiciary Committee within 90 days of receiving a nomination—if the nomination follows good-faith White House consideration of the bipartisan nominating commission's list and consultation with Senate leaders of both parties
- Timely floor votes, held on each "good-faith" nominee within 90 days of approval by the Judiciary Committee or, if the Committee does not vote on the nominee, within 180 days after nomination.

2008 presidential candidates should be asked, in a joint public forum, to commit to these steps before the election.

Key Facts

- Until the 1980s, unless a home-state senator objected, the Senate almost always confirmed nominees—and did so quickly.
- There are 179 appellate and 665 district judgeships today, *versus* 68 and 238 in 1955.
- President Clinton nominated 87 individuals to the regional court of appeals; 62 of them were eventually confirmed.
- As of October 31, 2007, President Bush has nominated 71 individuals to those courts, and 53 have been confirmed.
- For both Clinton and Bush, over 30 percent of appellate nominations have taken more than 180 days to be confirmed.

A full version of this proposal, as well as supporting background material, is available at www.opportunity08.org.

About the Author and the Project

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Russell Wheeler is a visiting fellow at the Brookings Institution. He studies the selection of U.S. judges and how courts function with other branches of government and the press, among other judicial topics. He is a former deputy director of the Federal Judicial Center, the research and education agency for the federal court system. He has also held positions at the National Center for State Courts and at the U.S. Supreme Court. He is the president of the Governance Institute.

Opportunity 08 aims to help 2008 presidential candidates and the public focus on critical issues facing the nation, presenting policy ideas on a wide array of domestic and foreign policy questions. The project is committed to providing both independent policy solutions and background material on issues of concern to voters.