

# Enough Already!



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## Federal Judicial Posts Need to Be Filled

For the past two years, I have had the privilege and pleasure of serving as a member of the American Bar Association's Standing Committee on the Federal Judiciary (SCFJ). The substance of the work, the collegiality and fellowship among committee members, and the learning experience have all been remarkable (in a good sense). Equally remarkable (in a bad sense) is "the persistent problem of judicial vacancies in critically overworked districts."<sup>1</sup> The problem deserves immediate attention! Unfortunately, the power and authority to resolve the issue do not rest with the committee.

## The Role of the SCFJ

The committee consists of a chairperson plus 14 members—one representative from each of the 13 federal judicial circuits except the 9th circuit which, because of its size, has two representatives. The committee evaluates the professional qualifications of prospective nominees to serve as Article III and Article IV judges. Neither the committee as a body nor any of its individual members has a candidate of its own. Rather, the committee receives the names of prospective nominees from the White House and investigates the qualifications of those individuals in terms of professional competence, integrity, and judicial temperament.<sup>2</sup>

Professional competence covers a prospective nominee's intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of experience. Integrity goes to character, general reputation in the legal community, industry, and diligence. Judicial temperament considers compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.

The committee does not ask about or take into account political affiliations, philosophy, or ideology in evaluating candidates.

The committee does consider the general reputation of prospective nominees in professional and community circles where they reside, practice, or preside. Most of that is accomplished through personal, confidential interviews of judges, lawyers, and local leaders who know firsthand of the prospective nominee's qualifications, background, and experience.

In general, committee members volunteer as many as 1,000 hours each year to conduct evaluations and prepare confidential written

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reports. Each report discusses the scope of the investigation; the substantive comments confidentially provided by interviewees; the qualifications, background, and experience of the prospective nominee; and a recommended rating of the nominee and the basis for the rating. Since a major portion of the investigation is based on interviews of judges and lawyers who know the prospective nominee's qualifications, the committee serves as a conduit for communicating the views of the bench and bar to the White House, the Senate, and the Department of Justice.

To assure impartiality and independence of the committee, its procedures, and its work, individuals who are part of the ABA governance or policy bodies are prohibited

from involvement in the committee's work. Information about prospective nominees or the substantive work of the committee is not shared with any ABA staff member or volunteer. Moreover, committee members are prohibited from serving as an ABA officer or a member of its board of governors, and no person who is a candidate for such office may serve on the committee. Further, as a condition of appointment to the committee by the ABA president, no member of the committee may seek or accept a federal judicial nomination while serving on the committee or for at least one year after his or her service has ended. Other safeguards for impartiality, such as recusal standards for committee members, are also in place.

Confidentiality is the cornerstone of the committee's work. Strict confidentiality of the identity of all interviewees and the substantive information sought and provided by them regarding the qualifications of prospective nominees is maintained. Additionally, each interviewee is asked to keep confidential the identity of the prospective nominee and the substance of the interview.<sup>3</sup>

Depending on whether the prospective nominee is a practicing attorney, sitting judge, or law school administrator or faculty member, investigations consist of interviews with judges of the federal, state, and local courts before whom the prospective nominee may have appeared; individuals who may have served as colleagues on the bench, in corporate law departments or law firms, or on law school faculties or bar association committees; or attorneys who may have served as co-counsel or opposing counsel in a legal matter (especially litigation). Briefs, opinions, books, articles, and other legal papers authored by the prospective nominee are examined and evaluated as part of the investigation, and committee members always contact disciplinary bodies for input. Committee members have a 30-day

period to complete investigations and submit written reports after the White House initially requests the evaluation.

The results of each investigation are independently analyzed by every committee member (except for those who have asked to be recused), all of whom share the goal of achieving excellence in judicial appointments. Members cast votes of "well qualified," "qualified," or "not qualified" for each prospective nominee. A well-qualified rating is the highest rating and means, among other things, that the prospective nominee is regarded as being at the top of the legal profession in his or her community. A qualified rating means the prospective nominee satisfied the committee's high standards and qualifications with respect to professional competence, integrity, and judicial temperament and is qualified to perform satisfactorily the responsibilities required of a federal judge. A not-qualified rating means the prospective nominee does not meet one or more of the committee's standards concerning professional competence, integrity, or judicial temperament and is regarded as not being able to perform satisfactorily as a federal judge.

Committee members convey their votes to the chairperson, who votes only in the event of a tie. The chairperson tabulates the votes and gives a single tentative rating to the White House. If the president decides to move forward with the nomination, the tentative rating becomes the official rating and the chairperson sends the rating to the Department of Justice, each member of the Senate, and the nominee. This is the only time the committee's rating is made public. The majority vote for a rating is the official vote of the committee. If after receiving the committee's rating the president decides not to proceed with the nomination, the rating is never made public.

Federal judges play an important and unique role in our democratic form of government. They "safeguard the integrity of the judicial process"<sup>4</sup> and in doing so, exercise independence in protecting against the unconstitutional exercise of power by the other branches of government, protect individual freedoms, and ensure respect for and adherence to the rule of law by impartially applying the law in the disposition of cases. Moreover, federal judges enjoy life-

time appointments, the only such appointment in our federal government. Therefore, it matters a great deal that the investigation of any prospective nominee be thorough, complete, and in accordance with the committee's standards.

### Blame Aside, Justice Delayed is Justice Denied

The growing crisis of unfilled federal judgeships is the result of the rising tide of filed cases and the increasing number of vacancies on the federal bench. Specifically, the 2010 caseload of the federal court system continues to increase in nearly all categories, while an increasing number of federal judgeships remain open.<sup>5</sup> Some observers blame partisan politics;<sup>6</sup> others point to additional factors, such as the Obama administration's large legislative agenda, two recent time-consuming confirmations for United States Supreme Court openings, a complicated background review process, and competing legislative priorities for the United States Senate.<sup>7</sup> Still others have articulated the consequences of the crisis without assigning blame. United States Supreme Court Associate Justice Anthony Kennedy has remarked, "It's important for the public to understand that the excellence of the federal judiciary is at risk, and if judicial excellence is cast upon a sea of congressional indifference, the rule of law is imperiled."<sup>8</sup>

For all its good work, the committee can only process evaluations when requested to do so. Addressing the crisis in unfilled federal judgeships rests with the executive branch and Congress.

Today, there are 88 vacancies among the country's 857 federal judgeship positions, and 33 are classified as judicial emergencies.<sup>9</sup> As United States Supreme Court Chief Justice John Roberts recently pointed out:

I am heartened that the Senate recently filled a number of district and circuit court vacancies, including one in the Eastern District of California, one of the most severely burdened districts. There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem.<sup>10</sup>

While I appreciate the wonderful experience of participating in the vetting process

for filling open federal judgeships, like others I am concerned by the sheer number of vacancies that exist on the federal bench, the crushing caseloads faced by many federal court judges, and, most importantly, the inordinately slow pace at which justice is being administered across the country in both civil and criminal matters. Without assigning blame, my hope is that our elected officials in Washington, D.C., will appreciate the critical importance of leaving politics aside and taking a bipartisan approach to fill vacancies so justice can be administered and litigants can have their day in court without undue delay. ■

### FOOTNOTES

1. Chief Justice John Roberts, United States Supreme Court, *2010 Year-End Report on the Federal Judiciary* (December 31, 2010) <<http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>>. All websites cited in this article were accessed May 25, 2011.
2. The committee's web page is at <[http://www.abanet.org/scfedjud/federal\\_judiciary09](http://www.abanet.org/scfedjud/federal_judiciary09)>. This article is largely based on public information available at that website.
3. Confidentiality is not always possible, particularly when prospective nominees are the subject of media speculation or public statements made by elected officials before the start of, or during the course of, the committee's investigation of a candidate.
4. *2010 Year-End Report*.
5. *Id.* The Appendix illustrates this point with specific data on increased caseloads across various categories.
6. See *Courts Without Judges*, Chicago Tribune, April 18, 2011 <[http://articles.chicagotribune.com/2011-04-18/news/ct-edit-judicial-20110418\\_1\\_judicial-nominees-confirmation-votes-judges](http://articles.chicagotribune.com/2011-04-18/news/ct-edit-judicial-20110418_1_judicial-nominees-confirmation-votes-judges)>.
7. See *Federal Judicial Vacancies Reaching Crisis Point*, Washington Post, February 8, 2011 <<http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706>>.
8. Cspan.org, *9th Circuit Judicial Conference with Justice Anthony Kennedy*, August 19, 2010 <<http://www.cspan.org/Events/9th-CircuitJudicial-Conference-with-Justice-Anthony-Kennedy/18925-1/>>.
9. A judicial emergency for federal circuit courts is defined as:
  - any vacancy in a court of appeals where adjusted filings per panel are in excess of 700
  - any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel
10. A judicial emergency for federal district courts is defined as:
  - any vacancy where weighted filings are in excess of 600 per judgeship
  - any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship
  - any court with more than one authorized judgeship and only one active judge <<http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>>.