

# IAJ/UIM

## 4<sup>th</sup> Study Commission—2023

### United States

## The Judicial Workplace and the Intersection with Judicial Independence

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### I. Appointment to Judicial Office

The United States Constitution provides the mechanism for appointments to the federal judiciary. By constitutional design, political forces are at play in the judicial appointment process, although merit plays an important and often overriding role. The Executive and Legislative branches of government, both comprised of elected officials, share power to appoint federal judges. The President has the power to nominate a judicial candidate. As a check on presidential appointment power, the nominee is then confirmed to judicial office with the “Advice and Consent of the Senate.”<sup>1</sup>

Congress designates a specific number of lower court federal judgeships, so the need for a President to nominate a judge arises when a judicial seat becomes vacant—typically upon the resignation, retirement, or death of a judge. The White House and Department of Justice rigorously evaluate potential nominees, and, in some districts, there are bi-partisan merit selection committees. Nominations for the circuit courts of appeal are typically considered to be the province of the White House, whereas home

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2.

state senators play a major role in nomination of district court judges. Additionally, judicial nominees undergo a confidential background examination by the Federal Bureau of Investigation and an assessment by the Standing Committee on the Federal Judiciary of the American Bar Association.

Once a nominee is selected, the President sends the nomination to the Senate. The Senate Judiciary Committee, composed of 22 senators, reviews the nominee's background and qualifications, as well as a written questionnaire that includes biographical information, financial disclosures, and activities in the legal, political, and academic fields. The Judiciary Committee also solicits opinions about the nominee from the United States senators in the state where the judicial vacancy is located. Finally, the Judiciary Committee holds a hearing that involves a question-and-answer session with the nominee and votes on whether the nomination should proceed to a vote by the entire Senate. Upon a favorable vote from a majority of the Judiciary Committee, the entire Senate considers the judicial nomination. The nominee is confirmed if at least 51 out of 100 senators vote in favor of the nomination. If the Senate is equally divided, a nominee may also be confirmed through a tie-breaking vote by the Vice President.

After a successful Senate confirmation, the President signs the nominee's commission, which empowers the nominee to assume the judicial position, following administration of the oath of office. In addition, the judge has an investiture, a ceremonial event attended by the judge's family and friends that can occur weeks or months after the judge assumes office.

The Constitution imposes no restrictions on whom the President may nominate to a judgeship. Presidents customarily nominate lawyers who have achieved a high level of professional qualification and possess the ability to

decide cases impartially. Judicial nominations have occasionally failed in the Senate based on ideological considerations.

Some Presidents have made a point to nominate diverse candidates to the federal bench. For example, President Jimmy Carter nominated 40 women to the federal bench between 1977 and 1980, shattering the previous presidential record of three women nominees.<sup>2</sup> President Barack Obama appointed more Asian American women judges to the federal bench than the previous 43 presidents combined.<sup>3</sup> And President Joe Biden had more than doubled the previous total number of Black women appointees to appellate courts by the end of 2022, his second year in office.<sup>4</sup> He has also sought diverse nominees beyond lawyers in private practice and has included nominees who served as public defense lawyers and lawyers in nongovernmental organizations.

The United States judiciary is composed of 94 trial courts, called “district courts,” 13 intermediate appellate courts, called “circuit courts,” and the Supreme Court. The federal courts have limited jurisdiction, which means they have power to hear only civil and criminal cases arising under the United States Constitution and federal laws, as well as state-law issues in specific circumstances. The same appointment process applies to judges at each level of the federal system except for magistrate and bankruptcy judges. The judges of the district court where a magistrate judge will serve appoint magistrate judges for eight-year terms, and magistrate judges generally have

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<sup>2</sup> Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELY LA RAZA J. 92, 106 (2016), [Link](#).

<sup>3</sup> *Id.* at 109.

<sup>4</sup> Candice Norwood, *Biden’s Judicial Nominations Have Set Records for Diversity, But Dozens Remain Unconfirmed*, THE 19TH (Dec. 13, 2022), [Link](#).

the power to issue warrants, preside over preliminary criminal proceedings, and handle pretrial motions and hearings. Circuit court judges appoint bankruptcy judges to preside over bankruptcy proceedings for 14-year terms.

## II. Promotion Within the Judiciary

There is no official “promotion” process within the federal judiciary. Judges are sometimes elevated from state or lower federal courts to the federal appellate courts or Supreme Court, but the President may nominate a candidate with no previous judicial experience to a judgeship at any court level. In recent years, about half of active circuit judges had prior judicial experience before assuming their appellate roles, and just under half of active district court judges had prior judicial experience.<sup>5</sup>

Elevation from lower federal courts is more common at the Supreme Court, where most Justices previously served as circuit judges. This may reflect a preference among Presidents to nominate Supreme Court Justices whose judicial philosophies and ideologies are known through their existing jurisprudence. Of the 116 Supreme Court Justices since 1789, only 41 have been appointed to the Court with no prior judicial experience.<sup>6</sup> Of the nine current Justices, eight previously served as circuit court judges and two began their judicial careers as district court judges.<sup>7</sup>

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<sup>5</sup> Congressional Research Service, *U.S. Circuit and District Court Judges: Profiles of Select Characteristics*, R43426 at 14, 27 (Aug. 1, 2017), [Link](#).

<sup>6</sup> U.S. Supreme Court Center, *Supreme Court Justices Without Prior Judicial Experience Before Becoming Justices*, FINDLAW (June 14, 2023), [Link](#).

<sup>7</sup> Supreme Court of the United States, *About the Court: Current Members*, SUPREMECOURT.GOV (June 14, 2023), [Link](#).

Even if a judicial nominee completed the presidential nomination and Senate confirmation process for an earlier judgeship, the nominee must complete the appointment process again to be elevated to a higher court.

### III. Workload Within the Judiciary

Federal judges do not have constitutionally or statutorily prescribed workload requirements. Under the Code of Conduct for United States Judges (ethics code), which applies to lower court judges, a judge “should perform the duties of the office fairly, impartially and diligently,” which includes the requirement to “dispose promptly of the business of the court.”<sup>8</sup> Commentary to the Code provides that a judge “must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.”<sup>9</sup>

Each district court has a written plan for assigning cases to trial judges, which usually involves a randomized drawing for assignment of cases. Although no universal workload requirements apply, the Civil Justice Reform Act of 1990 requires the judiciary to prepare a twice-yearly report naming district and magistrate judges with, for example, civil motions pending on their dockets for more than six months and civil cases pending

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<sup>8</sup> United States Courts, *Code of Conduct for United States Judges: Canon 3*, USCOURTS.GOV (Mar. 12, 2019), [Link](#).

<sup>9</sup> *Id.*

for more than three years.<sup>10</sup> This report, which is public, was designed to increase transparency and reduce delays in civil cases.

The federal circuit courts similarly set their own requirements for allocation of workload to circuit judges. Chief judges of the district and circuit courts (who accede to the position by seniority rather than election and generally serve seven years) are responsible for overseeing the workload in their jurisdiction. Unlike some state courts that require opinions and decisions to be made within 90 days of submission of the case, there is no such requirement in federal courts. Chief judges use persuasion, case management, periodic reporting on the status of cases, short-term relief from assignment of new cases, and possible reassignment of cases to manage delays. Chief judges will also try to determine the reason for the delay, such as unusual nature of caseload or possible illness or disability.

One aspect of workload management—called senior status—is available to experienced district and circuit judges. Senior status enables judges flexibility in the volume and nature of cases they hear. Since federal appointments are lifetime appointments, federal judges receive their salary for life, whether they remain in active, senior, or retired status. When a judge takes senior status, a vacancy opens on the court, allowing a new judge to be nominated by the President and confirmed by the Senate. To be eligible for senior status, a judge’s combined age and years of service must equal at least 80; for example, a 65-year-old judge may take senior status after at least 15 years of judicial service. There is no mandatory requirement age for federal judges and, consequently, no requirement that judges take senior status or reduce their caseload. Many senior judges maintain an active caseload and,

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<sup>10</sup> United States Courts, *Civil Justice Reform Act Report*, USCOURTS.GOV (June 20, 2023), [Link](#).

because virtually every court has excess demands, senior judges serve a critical role in addressing the court’s docket.

At the Supreme Court, the Justices determine how many cases they will hear each term. This discretionary decision contrasts with the circuit courts, whose appellate jurisdiction is generally mandatory. Of the more than 7,000 requests for Supreme Court review each year—called petitions for writ of certiorari—the Court typically grants certiorari and decides about 80 cases.<sup>11</sup> Decisions are typically issued by June 30 of each year, which serves as a form of workload management.

#### **IV. Removal from Judicial Office**

The Constitution provides for life tenure for federal judges, subject to “good behavior,” which means judges generally serve until their retirement or death. To preserve judicial independence, removal of judges is intentionally arduous under the Constitution. The Congress, in addition to playing a central role in confirming judges, has exclusive removal power. Removal requires impeachment by the United States House of Representatives and conviction in the Senate for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>12</sup>

A member of the House of Representatives may call for impeachment directly, but in modern times the impeachment process begins when a member of the House calls for an investigation by the House Judiciary Committee. The investigation process may include subpoenas, depositions,

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<sup>11</sup> Supreme Court of the United States, *FAQS: Frequently Asked Questions*, SUPREMECOURT.GOV (July 10, 2023), [Link](#).

<sup>12</sup> U.S. CONST. art. II, § 4.



and public hearings, and the accused judge is generally allowed to be represented by the legal counsel of their choosing. If a majority of the House Judiciary Committee votes in favor of impeachment, articles of impeachment enumerating the charges against the accused judge are brought before the entire House of Representatives.

If a majority of the House votes favorably on an article of impeachment, it goes to the Senate for trial. The Vice President ordinarily presides over the trial in the Senate. Accused judges are typically represented by counsel, and the Senate has traditionally required an opening and closing statement by each party. The trial procedure includes witness testimony, cross-examination, and evidence. Unlike the simple majority required for impeachment by the House of Representatives, conviction on an article of impeachment requires a “guilty” vote by two-thirds of senators present at trial. The penalty of removal from judicial office is understood to flow automatically from Senate conviction, and a convicted judge is no longer entitled to a federal salary and pension. The Senate may also, by majority vote, impose the penalty of disqualification from holding future office. There is no appeal from a Senate conviction.

Importantly, the impeachment process should not be predicated on legal disagreements with the merits of a judge’s decision; legal errors committed by lower courts are addressed in appeals to higher courts rather than through impeachment.<sup>13</sup> The Constitution does not define high crimes and misdemeanors, and impeachment as a penalty has historically been limited to extreme circumstances, such as when a judge is accused of

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<sup>13</sup> Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 989 (2007).



accepting bribes, making false statements, or committing sexual assault.<sup>14</sup> Given its limited use, the House of Representatives has impeached only 15 judges since the judiciary was formed in 1789; of the 15, only eight were convicted by the Senate and removed from judicial office.<sup>15</sup>

Neither impeachment nor conviction by the legislature precludes penalties through the United States judicial system. An impeached or convicted judge may still face criminal charges or civil liability for the same misconduct.

Short of removal, federal judges who violate the Code of Conduct for Federal Judges (ethics code) or commit other misconduct may be disciplined. The Judicial Conduct and Disability Act of 1980 governs the process through which any person may file a misconduct complaint about a judge.<sup>16</sup> Potential infractions include engaging in partisan political activity, creating a hostile workplace for court employees, or using the judicial office “to obtain special treatment for friends or relatives.”<sup>17</sup> Importantly, disagreement with judicial rulings is not a basis for a misconduct complaint. The chief judge of the circuit where a complaint is filed generally considers the complaint and, in some circumstances, may appoint a committee of judges to investigate. Possible sanctions for judges found to have committed misconduct include public or private censure, a pause on new cases assigned, training, or a

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<sup>14</sup> FJC, *Impeachments of Federal Judges*, FEDERAL JUDICIAL CENTER (June 13, 2023), [Link](#).

<sup>15</sup> *Id.*

<sup>16</sup> 28 U.S.C. §§ 351–364.

<sup>17</sup> United States Courts, *FAQs: Filing a Judicial Conduct or Disability Complaint Against a Federal Judge*, USCOURTS.GOV (July 2021), [Link](#).

recommendation that the House of Representatives initiate impeachment proceedings.

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