

## **Federal Court Appointment Process\***

1. U.S. Department of Justice keeps a file on likely candidates, getting names from Senators and other important party leaders.
2. Informal investigation is conducted with outsiders by the Deputy Attorney General.
3. An appointment decision is made by the Attorney General after which the Department of Justice consults with the U.S. Senate Judiciary Committee.
4. FBI investigation.
5. Recommendation from the Attorney General to the President.
6. Announcement of the nomination by the President, and it is sent to the Senate.
7. The Senate Judiciary Committee hold confirmation hearings, votes on the nominee, and reports to the full Senate where a final vote is taken.
8. The nomination goes to the President for signature after a majority vote of the Senate.

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\*Prior to the Biden Administration the names of leading candidates were vetted by the American Bar Association (ABA) Standing Committee on the Federal Judiciary, and the Committee rated them: Exceptionally Well Qualified, Well Qualified, Qualified or Not Qualified before an appointment was announced by the President. The American Bar Association still has input in the appointment process, but it is during the Senate confirmation process.

# *White House Won't Restore Bar Association's Role in Vetting Judges*

The decision not to give the American Bar Association names of potential nominees for evaluation came after progressives criticized the group for undercutting a push for diversity.

Charlie Savage, *The New York Times* National Edition, February 6, 2021, A13.

WASHINGTON — The Biden administration has told the American Bar Association that it will not restore the group's quasi-official gatekeeper role in vetting potential judges before the president decides whether to nominate them, according to the legal group's president, [Patricia Lee Refo](#).

The policy, a first for a Democratic president, echoes that of the last two Republican administrations. The bar association's role had dated to the Eisenhower administration and served as a way to ensure that judges who have tenure for life are qualified.

“Every White House sets its own rules for judicial nominations,” Ms. Refo said in an interview. “Other White Houses have found it useful to get our confidential evaluation in private. This White House has made a different decision. But the evaluation work that we do will go forward without change.”

The bar association and the Obama administration had recurring tensions over the fact that most of the “not qualified” ratings the bar group's peer-review system produced were for women or people of color. Against that backdrop, liberal groups greeted the decision as a signal that the White House under President Biden was determined to diversify the federal bench.

Not waiting for the bar association to vet potential nominees — a process that takes about a month, according to people familiar with it — is also likely to help speed Mr. Biden's efforts to push nominations into the confirmation pipeline [more quickly than President Barack Obama did](#). President Donald J. Trump set a [record-breaking pace in appointing judges](#) — [largely white and male](#) — during his term.

The decision by the White House was a blow to the prestige of the A.B.A., which describes itself as the largest voluntary association of lawyers in the world. Commenting on nominees only after their names have been put forward reduces the group's power to block potential judges it deems unqualified.

Still, the bar group — which has [expressed eagerness to work with the Biden administration](#) on various issues related to the judicial system — is not publicly objecting to the shift.

Randall D. Noel, this year's chairman of the bar association's vetting committee, said he had been in contact with Senate Judiciary Committee staff members since the White House decision and was told that lawmakers still greatly value the A.B.A.'s input. He

said his group would continue conducting its reviews before confirmation hearings, as it did under Mr. Trump.

The Biden administration's decision was [earlier reported by The Washington Post](#).

Paige Herwig, who focuses on judicial nominations for the White House Counsel's Office, said in an interview that the administration valued the bar group's input before senators vote. But, she said, the White House also believes it will have a freer hand to consider a wide range of nominees if the group does not wield prenomination veto power.

"All of this is in service of one of our broadest goals — the diversification of the judiciary, in terms of making sure that we have considered the most talented nominees from a wide range of personal and professional life experiences," she said.

During the transition, Dana Remus, the incoming White House counsel, [sent a letter to senators](#) emphasizing that the Biden administration was looking for diverse suggestions for filling judicial vacancies.

The bar association rates lawyers as "not qualified," "qualified," or "well qualified" to be judges after confidentially interviewing their professional peers about their competence, temperament, and integrity. Although the group says it does not consider ideology, Republicans have sometimes accused it of [bias against conservatives](#).

In 2001, President George W. Bush [broke with the decades-long practice](#) by stopping sending names to the group for vetting before nomination. Mr. Trump [did likewise when he took office](#) in 2017. But in 2009 the Obama administration restored the association's role, raising expectations in the group that Mr. Biden would do the same.

In a phone call last Friday, however, Biden administration aides including Ms. Remus and Ms. Herwig, informed Ms. Refo that Mr. Biden would not share the names of people he was considering nominating for advance vetting.

People briefed on the call said White House officials raised concerns that the subjective criteria by which the group gathered impressions from peers of lawyers under consideration might be vulnerable to unintentional negative assumptions and racial or gender stereotyping.

During Mr. Obama's presidency, the association's vetting committee [deemed candidates for judgeships "not qualified"](#) at a more frequent rate than it objected to potential nominees under President Bill Clinton, Mr. Bush or Mr. Trump. By November 2011, it had objected to 14 of 185 candidates.

Most of those the group rejected were women or members of a minority group, frustrating Obama administration officials who had made it a goal to diversify the bench. Their identities did not become public because Mr. Obama did not nominate any of those who received negative ratings. The recurring conflict was said to have contributed to [his delays in filling vacancies](#).

Christopher Kang, who worked on judicial nominations in the Obama White House and is now chief counsel of Demand Justice, a liberal advocacy group, praised the decision.

“Although well-intentioned, the A.B.A. Standing Committee is yet another corporate lawyer-dominated gatekeeper in the judicial selection process and must not be allowed to act as an obstacle to diversifying the bench,” he said

In weighing professional competence, the bar association has traditionally placed a high value on whether the people who may become judges have experience with lawsuits and trials.

Advocates of diversifying the bench say that one concern is whether that standard can shrink the available pool of female and minority lawyers by disadvantaging those who chose other types of legal careers, like being a law professor or a government lawyer.

Mr. Noel defended the A.B.A.’s inclusion of litigation experience as a factor in deciding who would make a good judge, saying that the courtroom was “where we operate professionally every day,” and that its smooth functioning could have high stakes in terms of sending people to prison or winning and losing fortunes.

While saying he did not know the details of the Obama-era disputes — he was not involved — he also said that Mr. Obama had succeeded, with the A.B.A.’s vetting as part of his selection process, in appointing [an historically diverse slate of judges](#). And he emphasized that the current screening committee was itself diverse.

The A.B.A.’s Standing Committee on the Federal Judiciary currently has 19 members who are appointed by the bar group’s annual presidents; most committee members serve staggered three-year terms. Unless there is a conflict of interest, the member from the same appeals court circuit as a judicial prospect serves as the “evaluator.”

An evaluator reads a nominee’s writings and confidentially interviews judges, law partners, opposing counsel, clients and others who have worked with that person about factors like their ethics, preparedness, writing skills and how they treat people.

Then the evaluator writes reports summarizing the findings and recommending a rating to the full committee, which votes. That process normally takes about 28 days, Mr. Noel said, unless it appears there is going to be a not-qualified rating, in which the committee will appoint a second evaluator to take another look.

Nan Aron, the president of the liberal Alliance for Justice, [said in a statement](#) that the A.B.A.’s former prenomination role “has primarily disadvantaged Democratic nominations” once Republican administrations since 2001 stopped giving the group names of potential nominees in advance. She also praised keeping it out of the preselection process, saying it would help Mr. Biden expand judicial diversity.

But Ms. Refo objected to the premise that the association would stand in the way of Mr. Biden’s diversity efforts.

“I can’t speak to what has happened in the past, but the American Bar Association is deeply committed to diversity and inclusion in the justice system and in every aspect of its work,” she said.

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