

***The Process of Appointment of Judges
in Some Foreign Countries:
The United States***

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EXECUTIVE SUMMARY

1. Section 2, Article II, the United States Constitution states: "[The President] ...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court, and all other Officers of the United States..." All federal judges are appointed by the President of the United States with the advice and consent of the Senate.
2. The process of appointment of a federal judge starts from the occurrence of a judicial vacancy. The Department of Justice with the White House staff recommend judicial nominations to the President. If the President approves, the nomination is signed and sent to the Senate.
3. Judicial nominations are referred to the Senate Judiciary Committee by the Senate. Nominees will be investigated, testified and the nomination voted in the Committee. As the majority party in the Senate controls a majority of the committee seats, the voting results on the Committee are generally representative of the voting preference in the full Senate.
4. Confirmation of judicial appointments requires a majority vote of the Senate. All nominations must be acted on in a session or they die at the end of the session. If a nomination is not acted upon, they must again be made to the Senate by the President. When Senate gives its advice and consent, the President signs the judicial commission which officially appoints the individual.
5. The influence of Senators in the stage of selecting nominees lies in the Senators' ability to recommend potential nominees. Senators will be asked to recommend potential nominees for a district court vacancy in their home state. In the cases of the Supreme Court or circuit courts nominees, the President may need to take Senators' recommendations into account for political reasons.
6. The standards of judicial selection include experience, integrity, professional competence, judicial temperament, and service to the law and contribution to the effective administration of justice.

THE PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED STATES

PART 1 - INTRODUCTION

1. Background

1.1 On 17 June 2000, the Panel on Administration of Justice and Legal Services requested the Research and Library Services (RLS) Division of the Legislative Council (LegCo) Secretariat to conduct a study on the process of appointment of judges in some foreign countries.

2. Scope

2.1 This research studies the process of appointment of judges in three common law jurisdictions, namely, the United States (U.S.), the United Kingdom (U.K.) and Canada. This report describes the process of appointment of judges in the United States. The U.S. is chosen because its Constitution stipulates that Senate gives advice and consent in the appointment of federal judges. In this study, only the appointment of judges in the federal courts is examined.¹

2.2 The focus of the research is the process of appointment, the role played by the legislature in the process, and the judicial selection standards.

3. Methodology

3.1 This study involves a combination of information collection, literature review, interview and analysis. Information has been obtained from relevant overseas government organizations, legislature, and academic and professional institutions.

¹ There are more than 25 000 state court judges throughout the country of the United States. Methods of selection of state court judges vary widely among the states and almost no states are alike. Please refer to the following studies for the details of state judicial selection: "Judicial Selection in the States" by American Judicature Society in 1999 and "Roadmaps: Judicial Selection" by the American Bar Association in April 1998.

PART 2 - SOME BASIC INFORMATION

4. Federal and State Courts²

4.1 The judicial system in the United States is known as dual court system, which means both state and federal governments have their own set of courts. Thus, there are 51 separate sets of courts in the United States, one for each state and one for the federal government.

5. Federal Court System and Jurisdictions

Supreme Court

5.1 There are three levels of federal courts: the Supreme Court, the Circuit Court of Appeals and the District Court. The Supreme Court is the highest court in the federal judiciary. The judges of Supreme Court comprise the Chief Justice and eight Associate Justices.³ Each year, the Supreme Court hears a limited number of appeal cases which begin in the federal or state courts.⁴

Circuit Courts of Appeals

5.2 There are one federal circuit and 12 regional circuits; each circuit has one circuit court of appeal (13 Circuit Courts of Appeals in total). The total number of authorized judgeships in the circuit courts is 179.⁵ The Circuit Courts of Appeals hear appeals from the district courts located within its circuit.⁶

District Courts

5.3 Under the 12 regional circuits, there are 94 judicial districts. The total number of authorized judgeship in the District Courts is 646.⁷ Within limits set by Congress and Constitution, the District Courts hear nearly all categories of federal cases, including both civil and criminal cases.⁸

² Federal courts here refer to Supreme Court, Circuit Courts of Appeals and District Courts only.

³ US Code, Title 28, Chapter 1, Section 1. Copy of the United States Code is available from the website: <http://www4.law.cornell.edu/uscode/>.

⁴ Understanding the Federal Courts, Administrative Office of the U.S. Courts 1999, p.7-10.

⁵ US Code, Title 28, Chapter 1, Section 41 & 44.

⁶ Understanding the Federal Courts, Administrative Office of the U.S. Courts 1999, p.7-10.

⁷ US Code, Title 28, Chapter 1, Section 133.

⁸ Understanding the Federal Courts, Administrative Office of the U.S. Courts 1999, p.7-10.

Figure 1 - Federal Court System

| Number of Courts | Number of Judges | Jurisdictions |
|--|---|--|
| 1 Supreme Court | Chief Justice + 8 Associate Justices = 9 | Appeal cases from federal or state courts. |
| 1 Federal Circuit Court of Appeal 12 Regional Circuit Courts of Appeals | 179 | Appeal cases from District Courts located within its circuit. |
| 94 District Courts | 646 | Trial courts of federal cases including both civil and criminal cases. |
| Total: | | 834 |

6. Methods of Appointment

6.1 Section 2, Article II, the United States Constitution states:

"[The President] ...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court, and all other Officers of the United States..."

6.2 Justices of the Supreme Court, judges of the Circuit Courts of Appeals and the District Courts [i.e. included under "all other officers of the U.S." referred to in the Constitution] all are appointed by the President of the United States with the advice and consent of the Senate. These justices and judges are appointed for life, and they can only be removed through impeachment by the Congress.⁹

7. Qualifications of Federal Judges

7.1 There is no statutory qualification for judicial appointment to the Supreme Court or the lower federal courts.¹⁰

⁹ Section 1, Article III, The US Constitution.

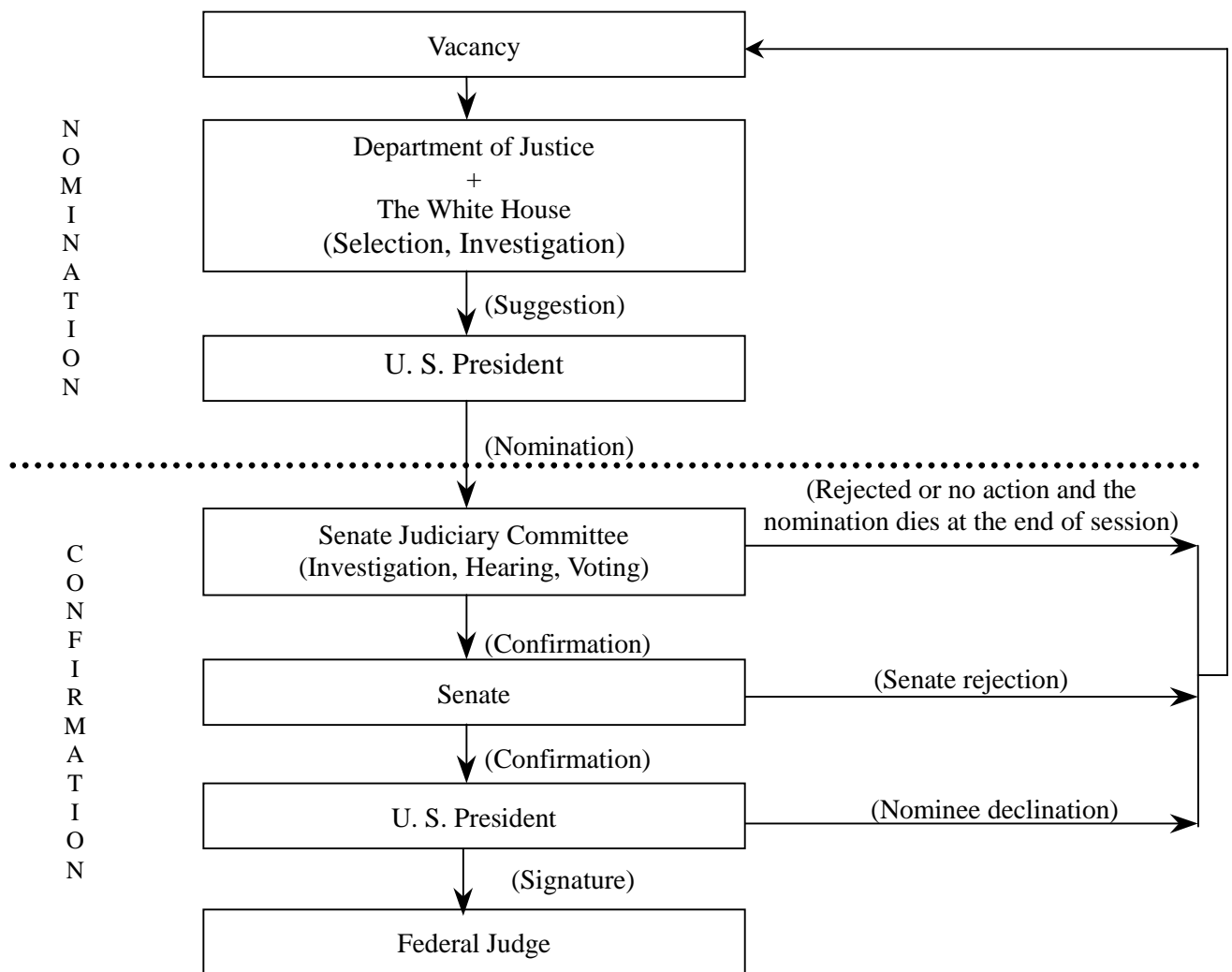
¹⁰ The US Constitution imposes no minimum age or other requirements on federal judges. As a matter of tradition, nominees usually need to have been admitted to the practice of law for at least ten years. Information provided by the US Department of Justice, 4 October 2000.

PART 3 - THE PROCESS OF APPOINTMENT OF JUDGES

8. Vacancy

8.1 The process of appointment of a federal judge starts from the occurrence of a judicial vacancy. The vacancy of a judgeship may arise from death, resignation, and retirement of a judge.¹¹ Also, vacancies can arise from legislation creating new judicial position and impeachment by the Congress.¹² The process of appointment of federal judges is summarized in Figure 2.

Figure 2 - The Process of Appointment of Federal Judges in the U.S.



¹¹ As set forth in Title 28 of the US Code, Section 371(c), federal judges may retire at the age of 65.

¹² Section 1, Article III, The US Constitution.

9. Selection and Nomination of Candidates by the President

9.1 The President nominates candidates for justices and judges to the Senate after he receives recommendations from the Department of Justice and his own White House staff.

Department of Justice

9.2 The Department of Justice, which is supervised and directed by the Attorney General, is responsible for making recommendations to the President concerning appointments to federal judicial positions. Within the Department, the Office of Policy Development (OPD)¹³ has primary responsibility for the judicial selection process of all Article III¹⁴ judicial vacancies.

9.3 The staff of the OPD interview a prospective nominee in person. (Please refer to para. 13.1 to 13.3 for the details of selection of candidates) They ask federal and state judges, prosecutors, and defenders as well as other attorneys and support staff about the candidate's reputation and merit for the federal bench. They also examine any articles written by or about the candidate, and review all of the cases, news, writings, and web sites mentioning the candidate, as well as financial disclosure statements and a physician's evaluation of the candidate's health. A questionnaire is sent to the potential candidate to collect his or her personal data. A sample of the questionnaire is in Appendix I.¹⁵

9.4 The OPD does not solicit the candidate's personal views on constitutional interpretation or political issues. Instead, the candidate is asked whether he or she has any views that would prevent the candidate from following the precedents of the higher courts or from being fair and impartial in all cases that might come before the court.¹⁶

9.5 If the preliminary evaluation of a prospective nominee is positive, the candidate's name will be transmitted to the Federal Bureau of Investigation for investigation and to the American Bar Association (ABA), an independent non-governmental organization, for evaluation.

Federal Bureau of Investigation

¹³ The head of the Office of Policy Development is Assistant Attorney General, information provided by the US Department of Justice, 4 October 2000.

¹⁴ Under the Article III of the United States Constitution, Justices of the Supreme Court, judges of the courts of appeals and the district courts, and judges of the Court of International Trade, are appointed for life, and can only be removed through the impeachment process, so they are also called "Article III judges". "Understanding the Federal Courts," Administrative Office of the U.S. Courts 1999.

¹⁵ Questionnaire is extracted from "Report of the Commission on the Selection of Federal Judges 1996." Miller Center Commission No. 7, May 1996.

¹⁶ Information provided by the US Department of Justice, 4 October 2000.

9.6 The Federal Bureau of Investigation's (FBI) investigation of potential judicial nominees is focused on general background issues. FBI agents usually begin their investigation by interviewing the judicial candidate to confirm the accuracy of the candidate's security questionnaire, which requires information to verify education, jobs, and residences, as well as any background issues since the candidate's eighteenth birthday. FBI agents also interview federal and state judges and other government officials, as well as attorneys, business and civic leaders, religious and civil rights leaders, neighbours, and doctors. They also check for arrests and convictions, civil lawsuits, and credit history. Additionally, a check on the candidate's tax record is included in the file. The OPD has stated that the FBI investigation is a critical component of OPD's evaluation of the candidate's suitability for the federal bench.¹⁷

The American Bar Association

9.7 The American Bar Association interviews judges and lawyers in the candidate's community about the candidate's qualifications, including temperament, and also interviews the candidate. At the end of the ABA process, the ABA sends an informal piece of advice to the Department of Justice on its rating of the candidate as "well qualified," "qualified," or "not qualified" if the President were to nominate the candidate.¹⁸

9.8 If the ABA rating is positive, the FBI report is satisfactory, and the Department of Justice's evaluation is favourable overall, the Attorney General formally recommends the nomination to the President.

The White House

9.9 The White House Counsel's Office works closely with the Department of Justice in the selection of potential federal judges. Also, the Office works as closely as possible with Senators, and also considers recommendations by Members of the House of Representatives, state Governors, state judicial selection panels, bar associations, government officials, and citizens.¹⁹

¹⁷ Information provided by the US Department of Justice, 4 October 2000.

¹⁸ Ibid.

¹⁹ Ibid.

President

9.10 The papers sent by the Department of Justice to the President include:²⁰

1. A letter from the Attorney General to the President formally recommending the nomination;
2. A memorandum from the Deputy Attorney General to a "designated" White House Assistant "touching on matters not in the Attorney General's formal letter" (typically who recommended the candidate and what political clearances were obtained);
3. The candidate's resume or biographical sketch;
4. A summary of the FBI Report along with the complete report itself; and
5. All other file material on the candidate including the response to the personal data questionnaire.

9.11 If the President approves the nomination, he signs it and sends it to the Senate.

9.12 Following the nomination, the Department of Justice submits the FBI Questionnaire, the results of the FBI background investigation and the entire Senate Questionnaire to the Senate.²¹

²⁰ Picking Federal Judges, Sheldon Goldman, Yale University Press, 1997, p.11. Information abstracted from "Memorandum to My Successor," November 26, 1968, EX FG 50 The Judicial Branch [1969-70], WHCF, Nixon Materials Projects, p.10.

²¹ The Senate Judiciary Committee sets the Senate Questionnaire. The Department of Justice (DOJ) has a copy of it and sends it to the nominee. The nominee sends it back to DOJ and DOJ sends it to the Committee. The Nominations Clerk of the Senate Judiciary Committee replied that the Committee did not receive any completed questionnaires of nominees that had not been officially nominated by the President. The Public has access to a nominee's Senate Questionnaire (except Part IV questions which are confidential). Please refer to Appendix I "D. Involvement in Legal Proceedings/Tax Audits/Other Confidential" for the details of the question. Information provided by the Nominations Clerk of the Senate Judiciary Committee on 10, 16 and 19 October 2000.

10. Confirmation by the Senate

10.1 The Senate acts in a unicameral capacity when it confirms federal judicial nominations. As the Constitution provides, only the Senate's "Advice and Consent" are necessary for the appointments of Judges of the Supreme Court and all other Officers of the United States. The House of Representatives is not involved in the process of appointment of federal judges. Within the Senate, the consideration of appointments to judicial positions is the responsibility of the Committee on the Judiciary.²²

The Committee on the Judiciary

10.2 The Senate Committee on the Judiciary or the Judiciary Committee consists of 18 members.²³ Following the rule that majority party in the Senate controls a majority of committee seats,²⁴ voting results on the Committee are generally representative of the voting preference in the full Senate.

Investigation

10.3 The Senate Judiciary Committee has its own staffers to examine the background of a judicial nominee. The bulk of the investigation is conducted by the staff of the Chairman and the minority party leader on the Committee.²⁵ The investigation involves reviewing the FBI Questionnaire, the results of the FBI background investigation and the entire Senate Questionnaire. The Committee staffers ask the home state Senators of the nominee for their opinion and conduct phone interview with the nominee to clear up any ambiguity encountered in the file. Any information discovered by the staffers will be reported to the Committee members.²⁶

²² Section (1), Senate Rule XXV stated "Committee on the Judiciary, to which committee shall be referred all proposed legislation, messages, petitions, memorial, and other matters relating to the following subjects:...(5) Federal courts and judges...."

²³ Senate Rule XXV(2), Standing Rules of the Senate.

²⁴ Senate Rule XXV(4)(c), Standing Rules of the Senate.

²⁵ Information from the Nominations Clerk of the Senate Judiciary Committee, 10 October 2000.

²⁶ Information from the Nominations Clerk of the Senate Judiciary Committee, 16 October 2000.

*Confirmation Hearing*²⁷

10.4 When the nomination is referred by the Senate, the Judiciary Committee is authorized to hold confirmation hearing,²⁸ and to take testimony by requiring by subpoena the attendance of witnesses and the production of correspondence, books, paper, and documents.²⁹ The confirmation hearings conducted by the Committee are open to the public, and may be broadcast by radio or television.³⁰

10.5 The confirmation hearing of a Supreme Court Justice nominee starts by the Senate Judiciary Committee Chairman's opening statement which is followed by endorsement of the nominee by prominent supporters, normally home state Senators. The nominee is invited to give an opening statement. Then, the hearing will proceed to the questioning time of the nominee by the Senators. After the nominee has given his testimony, other witnesses may follow and lend their support for or opposition to the nomination.³¹

Voting

10.6 After the confirmation hearing, Committee members will vote on the nomination. The quorum of the Judiciary Committee is ten; while vote by proxy is allowed, proxies are not counted for making a quorum.³² If a nomination gets a majority vote, it will go to the Full Senate.

²⁷ Congressional committee hearings may be broadly classified into four types: legislative, oversight, investigate, and confirmation. Each Senate Committee has the authority to hold confirmation hearings on presidential nominations to executive and judicial positions within its jurisdiction. Richard C. Sachs, "Types of Committee Hearing," CRS Report for Congress, The Library of Congress, February 17, 1999.

²⁸ Senate Rule XXXI "Executive Session - Proceeding on Nomination," which sets procedures on presidential nominees, is silent on hearings. While the Senate Rule XXVI(1) "Committee Procedure" states: "Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate."

²⁹ Normally, a nominee is very willing to fully disclose all information relevant to his/her confirmation. It is very rare that the Senate Judiciary Committee would need to subpoena materials from a nominee because the Committee has the power to reject his/her nomination. Information from the Nominations Clerk of the Senate Judiciary Committee, 16 October 2000.

³⁰ Senate Rule XXVI(1) and XXVI(5)(c), Standing Rules of the Senate.

³¹ Please refer to the following reports for the details of the procedure of Senate Committee Hearings: "Senate Committee Hearings: Scheduling and Notification," "Senate Committee Hearings: Arranging Witness," and "Senate Committee Hearings: Witness Testimony," by Carol Hardy Vincent; "Hearings in the U.S. Senate: A Guide for Preparation and Procedure," by Richard C. Sachs, Congressional Research Service, the Library of Congress. All these reports are available at the library of the Legislative Council.

³² Senate Rule XXVI 7(a)(1) and 7(a)(3), Standing Rules of the Senate.

10.7 If the Committee rejects a nomination with a majority vote, the nomination will be returned to the President.³³ In effect, the nomination dies.³⁴ However, after rejecting a nominee, the Committee may, if it chooses, vote to report the nomination to the floor - but it will be with an unfavourable recommendation.³⁵

10.8 When the Committee adjourns at the end of a session, all of the nominations still pending in Committee stage will be returned to the President.³⁶

Full Senate

10.9 All judicial nominations³⁷ reported from the Senate Judiciary Committee are considered by the Senate in executive sessions.³⁸ If a nominee is non-controversial, quite often the nomination will be passed by unanimous consent and no floor debate is necessary.³⁹ Confirmation of a nomination requires a majority vote of the Senate.⁴⁰ If a nominee is controversial there may be floor debate on the nomination (this is only by Senators and the nominee is not present in executive sessions). Historically, nominees who received an unfavourable recommendation by the Senate Judiciary Committee have never been voted favourably by the Full Senate.⁴¹

³³ To the question if a nomination is returned to the President by the Senate or the Senate Judiciary Committee, the Nominations Clerk of the Senate Judiciary Committee replied when a nomination being voted down by the Committee, it is returned to the President via the Senate technically, but in practice, the Senate Judiciary Committee returns the nomination to the President directly. Telephone interview with the Nominations Clerk of the Senate Judiciary Committee on 23 October 2000.

³⁴ During the 106th Congress (January 1999 to December 2000), there were 116 federal judicial nominations (record updated to 13 October 2000). No nominee was rejected by the Senate Judiciary Committee. It was recorded three nominees were withdrawn and 40 nominees were still pending in the Committee stage. "106th Congress Nominations Statistics", the Senate Judiciary Committee Homepage.

³⁵ Information from the Nominations Clerk of the Senate Judiciary Committee, 10 October 2000.

³⁶ Ibid.

³⁷ The nominations include a variety of materials, i.e. reports and recommendations, provided from the Senate Judiciary Committee to the Full Senate. Telephone interview with the Nominations Clerk of the Senate Judiciary Committee on 23 October 2000.

³⁸ To distinguish appointment confirmation from legislative business, the Senate maintains a separate Executive Calendar upon which treaties and nominations are placed when they have been reported from committees. Business on the Executive Calendar is considered in executive sessions. The common practice of the Senate is to convene in legislative session each day, either by motion or unanimous consent, then the Senate will resolve into executive session to deal with executive business. Walter J. Oleszek, Senate Executive Business and the Executive Calendar, CRS Report for Congress, The Library of Congress, the United States, March 25, 1999.

³⁹ Information from the Nominations Clerk of the Senate Judiciary Committee, 10 October 2000.

⁴⁰ During the 106th Congress (record updated to 13 October 2000), the Senate rejected only one nominee with the voting result of 45 to 54. The nominee was confirmed by the Senate Judiciary Committee with the voting result of 8 to 6. "106th Congress Nominations Statistics", the Senate Judiciary Committee Homepage.

⁴¹ Telephone interview with the Nominations Clerk of the Senate Judiciary Committee on 23 October 2000.

10.10 The President is, from time to time, furnished with an authenticated transcript of the public executive records of the Senate with a list of all judicial appointments, confirmations and rejections.⁴²

11. Appointment by the President

11.1 When the Senate gives its advice and consent, the President signs the judicial commission which officially appoints the individual.

11.2 Historically, six judicial nominees declined the appointments despite the Senate's confirmation and the President's appointment, and the last declination happened in 1882.⁴³

Recess Appointment

11.3 Under the US Constitution, Article II, Section 2, Clause 3, the President:

"shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

11.4 When the Senate is not in session, and therefore unable to receive nominations, the President may make recess appointments. The Senate will then consider the nomination when it returns to session.⁴⁴

11.5 A recess appointee exercises the same authority as an appointee who has been confirmed by the Senate, although he or she may not command the same deference.⁴⁵ The last appointment of a judge under this recess authority occurred in 1981.⁴⁶

⁴² Senate Rule XXXII, Standing Rules of the Senate.

⁴³ Among the six nominations, five were nominated by the President and confirmed by the Senate within two days. Elder Witt, Supreme Court A to Z, Congressional Quarterly Inc. 1994 and George Watson and John A. Stookey, "Shaping America: The Politics of Supreme Court Appointments," Arizona State University, 1995, p.242.

⁴⁴ The Constitution of the United States of America, Office of the Secretary of the Senate, p.20.

⁴⁵ Rogelio Garcia, "Recess Appointments Made by President Clinton," CRS Report for Congress, Congressional Research Service, The Library of Congress, the United States, January 5, 2000.

⁴⁶ Information provided by the US Department of Justice, 4 October 2000.

PART 4 - THE ROLE OF THE LEGISLATURE IN THE PROCESS OF APPOINTMENT OF JUDGES

12. Overview

12.1 In the U.S., the U.S. Congress is heavily involved throughout the process of appointment of federal judges. This includes both selection of candidates and confirmation of nominations.

13. Selection of Candidates

13.1 The Congress's influence in the selection of potential candidates lies in its capacity to make recommendation on potential nominees. According to the information obtained from the Senate Judiciary Committee,⁴⁷ it states:

“The names of potential nominees [for Supreme Court justices, court of appeals judges, and district court judges] often are recommended by Senators or sometimes members of the House [of Representatives] who are of the President's political party...”

District Courts

13.2 Traditionally, Senators are asked to recommend one to three potential nominees for a district court vacancy in the state which the Senators represent.⁴⁸ It is reported that the process of selecting judicial nominees has become more time-consuming and prolonged in district courts level as Senators are slow in making recommendations for district court vacancies.⁴⁹

⁴⁷ From the website of the Senate Judiciary Committee, <http://www.senate.gov/~judiciary/>.

⁴⁸ President Clinton's administration sought only one single recommendation for each vacancy. "Report of the Commission on the Selection of Federal Judges 1996," Miller Center Commission No. 7, May 1996.

⁴⁹ "Report of the Commission on the Selection of Federal Judges 1996," Miller Center Commission No. 7, May 1996.

Supreme Court and Circuit Courts

13.3 The involvement of Senators in the process of selecting candidates for the Supreme Court and circuit courts judicial vacancies is slightly lighter. The Supreme Court and circuit courts have jurisdictions that span the whole nation and several states. The President therefore has greater discretion and defers less to individual Senators when selecting nominees for the Supreme Court and circuit courts. When a vacancy appears on the Supreme Court or a circuit court, some Senators may seek to influence the selection of the new nominee. In such cases, the President may need to take their recommendations into account for political reasons.

Blue Slips

13.4 Before 1979, the counsel of the Senate Judiciary Committee sent out “blue slips” to the two Senators from the nominee’s state and if it was returned marked “objection” by either Senator regardless of party, the custom was that no confirmation hearing would be scheduled. This custom was changed after Senator Edward Kennedy became the head of the Committee. He made it clear that Senators who withheld the “blue slips” of persons nominated for judgeships from their states could no longer rely on the chairman to kill those nominations.⁵⁰ At present, though negative blue slips cannot kill a nomination customarily, it remains a common way to collect opinions of the Senators from the nominee's state.

14. Confirmation of Nominations

14.1 For years when there is a divided government with the President and the majority members in the Senate coming from two different parties, intentional delays may result in Senators refusing to bring controversial nominations to a vote, and instead using stall tactics to exhaust nominees and force their withdrawal. In 1999 and 2000 (updated to 11 August 2000), there were respectively 50 and 60 federal judiciary vacancies.⁵¹ According to a study,⁵² the Senate took an average of 201 days to confirm President Clinton's judicial nominees, as opposed to 144 days during President Bush's administration, and 138 days during the Reagan administration.

⁵⁰ Picking Federal Judges, Sheldon Goldman, Yale University Press, 1997, p.12 and 262.

⁵¹ Senate Judiciary Committee, <http://www.senate.gov/~judiciary/106stats.htm/>.

⁵² Study by the Citizen for Independent Courts, a non-partisan organization of scholars and legal practitioners, who seek to protect an independent judiciary. Homepage: <http://www.constitutionproject.org/>.

PART 5 - SELECTION STANDARDS

Judicial Selection Standards

15.1 Judicial appointments always draw the attention of the public and the legal profession. What constitutes the qualifying norms for a judge is an essential topic in the discussion of the judicial appointments. Unlike the nomination process, which is defined in terms of relatively concrete procedures, what qualifies one to be a judge or what are standards for judicial selection, are debatable. In July 2000, the American Bar Association adopted a report on "State Judicial Selection Standards" (Standards) which was prepared by its Commission on State Judicial Selection Standards (Commission).⁵³ The Standards apply to state trial and appellate judges in courts of general jurisdictions. The Standards aim to explore minimum standards for the qualifications of judicial nominees. Please refer to Appendix II for the details of the Standards.

⁵³ In 1999, the American Bar Association (ABA) Standing Committee on Judicial Independence established a Commission on State Judicial Selection Standards. The Commission was charged with drafting model standards for the selection of state court judges. Members of the Commission include representatives of various judicial professional bodies in the U.S. The Commission reviewed hundreds of documents and articles and heard testimony from senators and legal experts. Draft Standards were widely circulated among ABA entities, bar associations, courts and other interested organizations. The ABA adopted the "Standards on State Judicial Selection" in July 2000. Please refer to the following homepage for details of the Standards: <http://www.abanet.org/judind/home.html/>

PART 6 - ARGUMENTS AGAINST AND FOR THE CURRENT SYSTEM

16.1 In 1996, the seventh Miller Center Commission ("Miller Commission") released the "Report of the Commission on the Selection of Federal Judges".⁵⁴ In 1997, the American Bar Association (ABA) released the "Report of the ABA Commission on Separation of Powers and Judicial Independence".⁵⁵ The two reports contained criticisms and arguments in support of the current system of federal judicial appointments.

Arguments Against the Current System

16.2 Major criticisms are the chronic delays in the nomination and confirmation process and the heightened focus on ideology, which leaves the impression with the public that judges are not independent and impartial, but ideological and partisan.

16.3 Although the Commission agreed that the Senate should play an important role in the process of appointment of federal judges, it is of the view that the process has become increasingly complex and prolonged:

"Highly qualified persons may be reluctant to seek or accept nomination because of the burdensome and redundant screening and vetting process. They may also be concerned about personal privacy and low judicial salaries. Moreover, waiting in limbo for many months while nomination or confirmation is pending can be particularly hard on practising lawyers.... Ultimately, these problems inherent in the process of appointing federal judges affect the quality of those serving on the federal bench."⁵⁶

⁵⁴ The Miller Center is a non-partisan research center at the University of Virginia that studies the national and international policies of the United States, with a special focus on American presidents and the presidency. Periodically, the Miller Center forms National Commissions to research and make recommendations concerning specific executive branch issues or complex problems of the presidency. The commissions are independent, bipartisan committees made up of leaders in government, journalism, and the law. The seventh Miller Center Commission addressed problems concerning the process of appointing federal judges. The seventh Miller Center Commission was established in October 1994 and conducted interviews with all the participants involved in the process of appointing federal judges. Please refer to the following website for the details of this report, <http://www.millercenter.virginia.edu>.

⁵⁵ The ABA Commission on Separation of Powers and Judicial Independence was established in August 1996. The Commission was created to study judicial independence and accountability, to evaluate a number of events perceived by some as threatening judicial independence, and to make recommendations. The Commission received written and oral testimony from 28 witnesses in three hearings conducted in Washington, D.C. and San Francisco, California. Please refer to the following website for the details of this report, <http://www.abanet.org/govaffairs/judiciary/report.html>.

⁵⁶ "Report of the Commission on the Selection of Federal Judges 1996," Miller Center Commission No. 7, May 1996.

16.4 Professor Daniel Meador, a member of the Miller Commission, pointed out that the judicial selection process can, and perhaps does, impinge on the independence of the judiciary at two different points. First, the President may seek assurances from the candidate that he or she will decide certain issues certain ways, as a prerequisite to nomination. Second, the Senate may seek to extract comparable assurances from nominees, as a prerequisite to confirmation.

Arguments For the Current System

16.5 Witnesses in the ABA Report were in general agreement that the President and members of the Senate Judiciary Committee have a legitimate interest in questioning candidates for judicial office about a variety of matters. The ABA Commission agreed that the nomination and confirmation process is the one point at which the political branches may exercise a check on the composition and quality of the federal bench. To these ends, it is appropriate and desirable for members of the Senate and the President to explore the qualifications, character and judicial philosophy of would-be judges.

16.6 The ABA Commission agreed that problems arise when legitimate inquiries into a nominee's judicial philosophy degenerate into "thinly veiled efforts to preordain how the nominee will rule on specific issues in the future". It was agreed that protracted delays in the nomination and confirmation process, whether by design or as a result of inefficiency, weakens the federal judiciary and should be avoided. Therefore, the ABA has made certain procedural recommendations⁵⁷ and upheld the fundamental constitutional provision that the Senate should have the opportunity to give advice and consent before a judicial nomination is confirmed.

⁵⁷ Some of the recommendations are: (1) The White House, Department of Justice, FBI and American Bar Association all should complete their investigations of candidates within 90 days of a vacancy. (2) If a nominee is noncontroversial, the Senate Judiciary Committee should forgo holding confirmation hearings. (3) The committee should clear nominees for full Senate confirmation within two months of receipt of a President's nomination. For the details of the recommendations, please refer to the following website: <http://www.abanet.org/govaffairs/judiciary>

JUDICIAL NOMINEE QUESTIONNAIRES

Extracted from "Report of the Commission on the Selection of Federal Judges 1996, Miller Center Commission No. 7, May 1996"

(N.B. The Miller Center Commission has combined three different questionnaires set by the Senate Judiciary Committee [SENATE], Department of Justice [DEPT. OF JUSTICE] and the American Bar Association [ABA])

SENATE

DEPT. OF JUSTICE

ABA

Q# Substance Q# Substance Q# Substance

A. GENERAL PERSONAL QUESTIONS

| | | | | | |
|---------------|---|---------------|--|--------|---|
| I. 1. IV.1 | Full name and any former names used. | A. 1. A.2. | Full name and any former names used. Government position sought. | 1 | Full name and social security number. |
| I. 2. IV.2 | Address (current residence and office). | A. 3. A.4. | Current residence and mailing address. Home and office telephone numbers. | 2 | Office and home phone numbers and addresses (name of law firm if associated). |
| I. 3. | Date and place of birth. | N/A | Question not asked. | 3 4 | Date and place of birth. Naturalized? If so, give place and date. |
| I. 4. | Marital status and spouse's name/maiden name (if applicable), occupation and employer's name/address. | A. 5. | Marital status, spouse's current employer and also employer(s) for preceding five years (if applicable). | 5. a. | Marital status, date of marriage, spouse's name/maiden name (if applicable). |
| N/A | Question not asked. | N/A | Question not asked. | 5. b. | Divorced? If so, give date, moving party, case number, court and grounds. |
| N/A | Question not asked. | N/A | Question not asked. | 5. c. | Names of children; their ages, addresses and occupations. |

| | | | | | |
|-------|--|-------|---|-----|---|
| I. 5. | Education (list each college, law school and date of degree). | N/A | Question not asked. | 7 | List colleges and law schools attended, degrees received, and reasons for leaving if degree not received. |
| I. 6. | Employment record (list by year each business or other enterprise since college). | A. 6. | List all jobs held in last 10 years with job title, employer, location and dates. | 16 | List any occupation not legal, judicial or in public office with dates and details. |
| I. 7. | Military service (list dates, service, rank, serial number and type of discharge). | N/A | Question not asked. | 6 | Military service (list dates, branch, rank, serial number and type of discharge). |
| I. 8. | Honors and Awards of interest to the Committee. | N/A | Question not asked. | 28. | List honors, prizes, awards not previously mentioned. |

| | | | | | |
|-------|--|-------|--|-------|--|
| I. 13 | What is present state of your health and when was your last physical exam? | B. 8. | What is the condition of your health? | 24. a | What is the present state of your health? |
| | | B. 9. | Have you had a physical exam recently? | 24. b | In last 10 years have you been hospitalized for injury/illness or prevented from working? If so, give particulars. |
| | | | | 24. c | Suffer from any impairment? If so, give details. |
| | | | | 24. d | When was your most recent exam and who was the doctor? |
| | | | | 24. e | Currently being treated for illness? If so, give details. |
| | | | | 24. f | Ever treated for alcohol or drug dependency? If so, give details. |
| | | | | 24. g | Ever treated for mental illness? If so, give details. |

B. LEGAL EXPERIENCE AND BACKGROUND

| | | | | | |
|------|--|-------|--|-----|--|
| I.9. | Bar Associations (list all legal or judicial committees or conferences with titles and dates). | B. 3. | All memberships and offices in professional, fraternal, scholarly and civic organizations. | 26. | All bar associations and professional societies with dates and offices held (including significant committee memberships). |
|------|--|-------|--|-----|--|

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|-------|---|-------|---------------------|------|--|
| I. 10 | Other memberships in organizations which lobby public bodies. | B. 3. | See above. | 27. | All memberships in organizations other than bar associations or professional societies. |
| | | | | J27b | Judge: also list chairmanships of bar associations and professional societies. |
| | | | | J27c | Judge: describe participation, if any, on judicial committees, conferences, and as designated appellate judge. |
| I. 11 | All courts in which admitted to practice with dates and list any lapses. Same information for administrative bodies requiring special admission. | N/A | Question not asked. | 8. | All courts in which admitted to practice with dates of admission and the same for administrative bodies requiring special admission. |
| I. 12 | List of all publications with copies of material not readily available and speeches on constitutional law or legal policy with readily available press reports about such speeches. | N/A | Question not asked. | 25. | Furnish at least five examples of legal articles, books, briefs, etc. which represent your personal work (for briefs, indicate the degree to which they represent your personal work). |

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|-------|--|-----|---------------------|--------------------------------------|---|
| I. 14 | State chronologically any judicial offices held with description. | N/A | Question not asked. | 14. a J.12 J13 J14. | Give dates and details of any judicial offices held with description. Judge: Describe your ten most important opinions with cites and appellate review, if any. Judge: describe any non-judicial office held. |
| I. 15 | Provide citations for your ten most important opinions (if applicable), same for all appellate opinions reversing or criticizing your rulings, and your significant opinions on state or federal constitutional issues with related appellate rulings (if not readily available, provide copies of these). | N/A | Question not asked. | N/A | Question not asked. |

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|-------|---|-------|---|-------|--|
| I. 16 | State any other public offices held with terms of service and descriptions, and list chronologically other candidacies. | B. 6. | List all offices with a political party in the last ten years, and any candidacies during the last ten years. | 14. b | Give details of any non-judicial public office ever held, including dates of service and whether elected or appointed. |
| II.6 | Ever play a role in a political campaign? If so, identify particulars, including candidate, dates, and your title/responsibilities. | B.7. | List all contributions to political parties/ election committees during the past six years. | 15. | Give details and dates of any unsuccessful candidacies. |

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|-------|--|-----|---------------------|----|--|
| I. 17 | <p>Describe chronologically your legal career including:</p> <p>a. 1. Clerkships.</p> <p>a. 2. Solo practice.</p> <p>a. 3. Law firms, companies, and gov't agencies.</p> <p>b.1. Describe general character of your practice.</p> <p>b.2. Describe former clients and specialities.</p> <p>c.1. Frequency of appearances in court? If this varied, give by date.</p> <p>c.2. Percentage of appearances in (a) federal, (b) state, and (c) other courts.</p> <p>c.3. Percentage (a) civil and (b) criminal.</p> <p>c.4. Number of cases tried to conclusion and state your role.</p> <p>c.5. Percentage of cases (a) jury and (b) non-jury.</p> | N/A | Question not asked. | 9. | <p>Describe chronologically your law practice including:</p> <p>a dates of clerkships.</p> <p>b periods of solo practice</p> <p>c periods with law firms, companies or gov't agencies with names and phone numbers of those with direct knowledge of your work there.</p> <p>d any other relevant particulars.</p> <p>10. a Describe general character of your practice over time.</p> <p>b Describe your typical clients and areas of specialization.</p> <p>11. During last five years:</p> <p>a. What was frequency of appearances in court? If this varied, describe such variances and give dates for them.</p> <p>b. What percentage of appearances in (a) federal, (b) state, and (c) other courts?</p> <p>c. What percentage (a) civil and (b) criminal?</p> <p>d. Number of cases tried to conclusion and what was your role?</p> <p>e. Percentage of cases (a) jury and (b) non-jury?</p> <p>12. Same for prior 5 years.</p> |
|-------|--|-----|---------------------|----|--|

C. FINANCIAL DATA AND CONFLICT OF INTEREST

| | | | | | |
|-------|--|--|--|-------------------------|---|
| II.1 | Sources, amounts and dates of all anticipated receipts from business relationships. Describe arrangements for any future compensation. | E.1. | Describe all financial arrangements for deferred compensation from business relationships. NOTE: DOJ requires financial information as to all household members. | 17. a. b. | Are you now an officer or manager of business enterprise? If so, give details including title and term. Do you intend to resign such positions? If not, give reasons. |
| II.2. | Explain how you will resolve potential conflicts of interest and identify likely areas which may initially pose conflicts. | C.1. (A) (B) (C) D.1. E.2 E.3 E.4 | List all organizations: connected to you in business relationship. in which you have continuing financial relationship (detail). in which you have other financial interests (detail). Will you sever all business connections if confirmed? Describe any business or financial relationship or transaction of the last five years which could result in a potential conflict of interest. Describe any lobbying activity of the last five years. Explain how you will resolve any conflict of interest raised by the responses above. | 17. | See Q# 17 above. |

| | | | | | |
|-------|--|-----|---------------------|-----|---|
| I. 18 | Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also: (a) date of representation. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel and principal counsel for other parties | N/A | Question not asked. | 13. | Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also: (a) dates of trial. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel for each of the other parties. |
| I. 19 | Describe the most significant legal activities you pursued (non-trial or non-litigation). Describe the nature of your participation (unless privileged). | N/A | Question not asked. | N/A | Question not asked. |

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|-------|--|--------------------------|---|------|---------------------|
| II.3. | Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain. | D.2. | Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain. | 17.b | See Q# 17.b above. |
| II.4. | List all sources of income received in the calendar year prior to nomination. | C.2. | Provide a complete net worth statement which includes: | N/A | Question not asked. |
| II.5. | FINANCIAL STATEMENT REQUIRED | (A) (B) (C) (D) | itemized assets. liabilities in excess of \$1000. sources and amounts of items of value. copies of last three federal tax returns. FINANCIAL STATEMENT REQUIRED | | |

D. INVOLVEMENT IN LEGAL PROCEEDINGS/TAX AUDITS/OTHER CONFIDENTIAL

| | | | | | |
|------|--|-----|---------------------|-----|---------------------|
| IV.3 | Ever been discharged or resigned due to impending discharge? | N/A | Question not asked. | N/A | Question not asked. |
| IV.4 | Have you and your spouse paid all back taxes? Any tax payments made prior to your nomination? If so, detail. | N/A | Question not asked. | N/A | Question not asked. |

| | | | | | |
|-------|---|------|--|----------------|---|
| IV.5. | Tax lien or collection procedure ever instituted against you? If so, detail. | N/A | Question not asked. | 20. | Tax lien ever instituted against you? If so, give particulars. |
| IV.6 | You or spouse ever subject of any tax audit or inquiry? If so, detail. | B.1. | Have your tax returns ever been the subject of an audit or inquiry? If so, explain. | N/A | Question not asked. |
| IV.7. | You or your spouse ever declared bankruptcy? If so, give particulars. | N/A | Question not asked. | N/A | Question not asked. |
| IV.8 | Have you or any organization you belonged to ever been under investigation for violating any law or regulation? If so, detail. | B.2 | Are you currently under federal, state or local investigation for possible violation of a criminal statute? If so, give details. | 18. 19. | Ever been arrested, charged or held by federal, state or local law enforcement for violation of any law, regulation or ordinance? If so, give details. Have you ever been under investigation for possible violation of a criminal statute? If so, give particulars. |
| IV.9 | Have you ever been the subject of a complaint to any group, agency or court for breach of ethics or rule of conduct? If so, give particulars. | B.4. | Ever been disciplined or cited for breach of ethics or unprofessional conduct or been the subject of any such complaint? If so, give full details. | 23. | Ever been cited or disciplined for breach of ethics or unprofessional conduct or been the subject of any such complaint? If so, give particulars. |

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|-------|---|------|---|------------|---|
| IV.10 | Ever been a party to any litigation? | B.5. | Ever been involved in any civil litigation or administrative proceedings appropriate for consideration by the Committee? If so, give details. | 21. 22. | Ever been sued by a client? If so, detail. Ever been a party in any other legal proceeding? If so, give particulars. |
| IV.11 | Please advise the Committee of any other adverse information that may affect your nomination. | B.10 | Without details, anything in your personal life which may be of embarrassment to the administration? What about near relatives? | 30. | State any other information adverse or positive which should be disclosed in connection with your nomination. |

E. GENERAL/OTHER

| | | | | | |
|-------|--|-----|---------------------|-----|---|
| III.1 | Describe your work to provide those disadvantaged with legal services. | N/A | Question not asked. | 29. | Describe any pro bono or community service activities undertaken. |
| III.2 | Any membership in a discriminatory organization? If so, what efforts did you make to try to change such policies? | N/A | Question not asked. | N/A | Question not asked. |
| III.3 | Selection committee in your jurisdiction to recommend nominations? If so, did they recommend you? Describe the entire process you underwent. | N/A | Question not asked. | N/A | Question not asked. |

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|-------|--|-----|---------------------|------------------------|--|
| III.4 | Did anyone involved in your selection discuss any legal case or issue seeking to learn how you might rule? If so, explain fully. | N/A | Question not asked. | N/A | Question not asked. |
| III.5 | Discuss your views on a criticism of judicial activism. | N/A | Question not asked. | N/A | Question not asked. |
| N/A | Question not asked. | N/A | Question not asked. | J24a b. c. d. | Judge: Did you participate in any proceeding in which you had a financial interest? If so, give particulars. Is there a rule in your court as to sitting on such cases? If so, state the rule and whether you complied with it. Have you, to best of your knowledge, complied with applicable ABA statutes and canons? If no, give particulars. Ever receive outside compensation (other than for teaching)? If so, give particulars. |

STATE JUDICIAL SELECTION STANDARDS

Adopted by the American Bar Association July 2000

Experience

A candidate for judicial office should be a member of the Bar for at least 10 years and have been engaged in the practice or teaching of law, public interest law, or service in the judicial system.

Integrity

The candidate should be of high moral character and enjoy a general reputation in the community for honesty, industry and diligence.

Professional Competence

Professional competence includes intellectual capacity, professional and personal judgement, writing and analytical ability, knowledge of the law and breadth of professional experience, including courtroom and trial experience. Candidates for appellate judgeships should further demonstrate scholarly writing and academic talent, and the ability to write to develop a coherent body of law.

Judicial Temperament

Judicial temperament includes a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion.

Service to the Law and Contribution to the Effective Administration of Justice

Service to the law and contribution to the effective administration on justice includes professionalism and a commitment to improving the availability of providing justice to all those within the jurisdiction.

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