AAUW pays close attention to judicial nominations because so many of our fundamental rights and liberties are established and protected by the federal courts, state and U.S. Supreme Court precedents, and executive-branch enforcement efforts. AAUW’s 2015–17 Public Policy Program supports “a fair, balanced, and independent judiciary” to ensure constitutional protection for the civil rights of all individuals. Federal courts up to and including the Supreme Court are often also the last, best hope for women who have experienced discrimination in education, employment, health care, and other aspects of their lives. Our courts need qualified judges who reflect America’s diversity and are committed to upholding our constitutional values and ensuring that the clock is not turned back on decades of progress for women and girls.

The U.S. Constitution lays out a clear process for selecting individuals to serve in these federal judicial roles. It requires the president and the Senate to work together to ensure court vacancies are filled in a timely manner with qualified judges. The Senate has few constitutional duties more significant than that of advising on and consenting to judicial nominations, and AAUW believes a full vetting of each nominee must include close examination of threshold questions concerning qualifications, temperament, and potential conflicts of interest. Nominations should be considered in a thoughtful and thorough manner and should be exempt from the standard political and partisan jockeying.

Constitutional Authority for Judicial Selection
The president nominates judges for U.S. district courts (trial courts of general federal jurisdiction), U.S. circuit courts (intermediate appellate courts) and the U.S. Supreme Court. The “appointments clause” in the Constitution lays out three sequential acts in order to fill a judicial vacancy. First, the nomination by the president, second the advice and consent of the U.S. Senate, and third the appointment by the president. There is no exception for the president to refuse to nominate a successor nor is there an exception for senators to refuse to provide advice and consent.

Senate Procedure for Confirmation Process
The Senate Judiciary Committee begins by investigating the background and qualifications of the president’s nominee. The committee also maintains the Senate tradition known as “blue slip,” which gives significant weight to the home-state senators of a judicial nominee. Nominees receive committee action only when both home-state Senators have returned “positive” blue slips indicating their approval. A confirmation hearing is typically held to allow a question-and-answer session with members of the Judiciary Committee. After a hearing, the committee can vote to report the nomination favorably, unfavorably, or without recommendation. The majority leader can then schedule a vote to begin debate (cloture) and vote on the confirmation.

Since 2013, nominees to circuit and district courts require a vote of a majority of senators present and voting, or 51 votes if all 100 senators vote. This makes it easier for a judge to get an “up-or-down” vote but severely limits the minority party from extending debate through the traditional filibuster. Nominees for the U.S. Supreme Court however still require 60 votes to invoke cloture and proceed to a vote.

Judicial Qualifications
Although the Constitution is silent on qualifications to be a federal judge, Congress has developed their own informal criteria. Modern presidents have also stated their requirements include high professional standards and the ability to be impartial as a judge. Since 1953, every presidential administration, except that of George W. Bush, has sought American Bar Association prenomination evaluations of its candidates for district and circuit court judgeships.

No president has a mandate to nominate individuals to the bench who are hostile to the protection of civil and constitutional rights and individual liberties, and no nominee is presumptively entitled to Senate confirmation. The process used to confirm federal judges is extremely important, because federal judges remain in office during “good behavior” and can serve a life term unless removed by impeachment.
AAUW believes the Senate must carefully examine all relevant evidence, including unpublished opinions and other information that may not yet have been made public. Senators must carefully review each candidate’s record on privacy, civil rights and liberties, disability rights, environmental protections, education and employment rights, and worker and consumer safety. The mere absence of disqualifying evidence in a nominee’s record should not constitute sufficient grounds for confirmation. Of particular concern is each candidate’s approach to settled law, or stare decisis.

**U.S. Supreme Court**

In the time of a Supreme Court vacancy, the Constitution requires the president and the U.S. Senate to move forward to fairly and expeditiously select and consider a qualified nominee. Every U.S. Supreme Court nominee since the 1980s has received a prompt hearing and vote within 100 days. However, the Senate Judiciary Committee stymied President Obama’s nominee to the Supreme Court, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit Merrick Garland, by refusing a hearing until after the president’s successor was elected.

AAUW believes the Senate’s action to refuse a hearing for Garland, a highly regarded consensus nominee, severely undermined the confidence of the public in the judicial succession process and invited even more partisan acrimony for any future nominee. AAUW calls on future administrations to seek consensus nominees to the highest court in the land and the Senate to work in good conscience to fill this vacancy.

**U.S. Circuit Courts of Appeals and District Courts**

The lower federal courts are extremely important in deciding thousands of cases that affect the lives of millions of Americans. Due to a dramatically reduced Supreme Court docket, which handed down only 76 opinions in 2014–15 compared with 107 in 1991–92 and 141 in 1981–82, the federal circuit courts of appeals have been the final arbiters for the vast majority of federal cases on many important issues. It is therefore critical that judges confirmed to all levels of the federal courts are moderate and committed to upholding valued rights, protections, and established legal precedents.

Historically, presidents received much deference from senators in their selection of lower court judges. However, recently the Senate has aggressively exercised its constitutional authority and committee rules to heavily influence the process of judicial selection. Although Senate floor votes rejecting presidential nominees are rare, the Senate’s refusal to act promptly or deliberately on judicial nominations is increasingly common when the Senate majority political party is not the same as the president’s party. Partisan debates are more common with allegations of “obstructionism” or tactics designed to delay or block committee or full Senate action on particular or even relatively large numbers of judicial nominations.

Unfortunately, courts have struggled to keep up with caseloads and faced judicial emergencies in recent years. AAUW cherishes the Senate tradition of extended debate, but abuse of the confirmation process hinders that tradition. During the 114th Congress, the Senate’s failure to confirm judges showed contempt for the process, prolonged judicial emergencies, and undermined public confidence in our democracy.

- During the 114th Congress, the Senate confirmed just 20 circuit and district court judges—an average of fewer than one confirmation per month.
- By the end of the 114th Congress, there were 105 total judicial vacancies, 38 of which constituted judicial emergencies.
- The 114th Congress ended with 23 lower-court nominees awaiting Senate confirmation—including 14 women—who had been fully vetted, approved by their home state senators, and have earned the bipartisan support of the Senate Judiciary Committee. These votes would collectively take mere minutes and would fill long-empty courtrooms with capable and competent judges. The Senate must do its part to ensure that our courts have qualified judges who will uphold our constitutional values and ensure that the clock is not turned back on decades of progress for women and girls. These delayed confirmations mean heavier workloads for courts and longer delays for those appearing before the courts. The president should seek consensus nominees for these positions, and the Senate should act in good faith to end the judicial emergencies, which create unacceptable federal case backlogs.

**Diversity in Courts in Recent Years**

Not only do our courts need judges who will uphold our constitutional values of liberty, equality, and justice for all, but they also need judges who reflect America’s
diversity. This is the best way to ensure that the clock is not turned back on decades of progress for men and women of all races.

For 140 years, there were no women in the federal judiciary. It wasn’t until 1934 that Florence Allen became the first woman confirmed to the U.S. Court of Appeals for the 6th Circuit. President Harry Truman resorted to a recess appointment (a temporary appointment that does not require immediate consent from the Senate) to elevate Burnita Shelton Matthews, the first woman to serve on a U.S. district court, in 1950. Sandra Day O’Connor became the first woman justice of the Supreme Court of the United States in 1981.

The passage of Title IX in 1972 and women’s increased participation in the workforce has meant a dramatic increase in the number of women practicing law. Indeed, the proportion of women in law school has increased from 3.7 percent in 1963 to 48.7 percent in 2015. Although women serve at all levels of the judiciary, up to and including the Supreme Court, our work for equality is not finished. Women make up only about one-third of all judges on U.S. circuit courts (35.3 percent), U.S. district courts (33 percent), and state courts (31.1 percent).

President Obama appointed the highest percentage of women and minorities to federal judgeships in history. He nominated more female federal judges than President George W. Bush (145 to 71), and more minority women (33) than President Bush (22) or President Clinton (23). About 42 percent of Obama’s nominees were women, and about 36 percent were minorities. President Obama also nominated more LGBT judges (13) than any other president. These judges come from varied backgrounds and are well-qualified.

AAUW encourages future administrations to continue nominating qualified women and minorities. Diversity is an important factor to ensuring a fair, objective, and independent judiciary. Personal and professional experiences affect how judges approach the cases that come before them. Diversity ensures our judges reflect all of American experiences and builds public confidence that their perspectives are being heard.

How Judicial Vacancies Affect Women and Families
We need to do more to support women in the federal judiciary by making sure women are in the career pipeline for these appointments and that the men and women who are nominated respect the unique role that the federal courts play in protecting women’s rights.

Not only can the federal courts be a shield for civil rights laws like Title IX and the Equal Pay Act, but they are also often the best and last hope for women who have experienced discrimination in education, employment, health care, and other aspects of their lives. A strong judiciary is critical to American women.

Additional Resources
Congressional Research Service
“The Appointment Process for U.S. Circuit and District Court Nominations: An Overview”
fas.org/sgp/crs/misc/R43762.pdf

Administrative Office of the U.S. Courts
Judicial Vacancies
www.uscourts.gov/judges-judgeships/judicial-vacancies

Alliance for Justice
Broadening the Bench: Professional Diversity and Judicial Nominations
www.afj.org/reports/professional-diversity-report

You provide the voice; we’ll provide the megaphone. Sign up to take action for women and girls today: