Appointment of Supreme Court Justices
How the Process Works

The appointment of a Supreme Court justice is an event of major significance in American politics. Each appointment to the nine-member Court is of consequence because of the enormous judicial power that the Court exercises, separate from, and independent of, the Executive and Legislative branches. While "on average, a new justice joins the Court almost every two years," the time at which any given appointment will be made to the Court is unpredictable.

Appointments may be infrequent (with a vacancy on the Court occurring only once or twice, or never at all, during a particular President's years in office) or occur in close proximity to each other (with a particular President afforded several opportunities to name persons to the Court).

The procedure for appointing a justice to the Supreme Court is provided for in the U.S. Constitution in only a few words. The "Appointments Clause" (Article II, Section 2, Clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court." While the process of appointing justices has undergone some changes over two centuries, its most essential feature — the sharing of power between the President and the Senate — has remained unchanged: To receive appointment to the Court, one must first be formally selected ("nominated") by the President and then approved ("confirmed") by the Senate.

Although not mentioned in the Constitution, an important role is also played midway in the process — after the President selects, but before the Senate as a whole considers the nominee — by the Senate Judiciary Committee. Since the end of the Civil War, almost every Supreme Court nomination received by the Senate has first been referred to and considered by the Judiciary Committee before being acted on by the Senate as a whole.

For the President, the appointment of a Supreme Court justice can be a notable measure by which history will judge his presidency. For the Senate, a decision to confirm is a solemn matter as well, for it is the Senate alone, through its "Advice and Consent" function, without any formal involvement of the House of Representatives, which acts as a safeguard on the President's judgment.

Traditionally, the Senate has tended to be less deferential to the President in his choice of Supreme Court justices than in his appointment of persons to high Executive Branch positions. The more exacting standard usually applied to Supreme Court nominations reflects the special importance of the Court, coequal to and independent of the presidency and Congress. Senators are also mindful that, as noted earlier, justices receive what can amount to lifetime appointments.

From the Library of Congress, Congressional Research Service report Supreme Court Appointment Process: President's Selection of a Nominee," *April 1, 2016. See https://fas.org/sgp/crs/misc/R44235.pdf.*

■ How Supreme Court Vacancies Occur

Under the Constitution, justices on the Supreme Court hold office "during good Behaviour," in effect typically receiving lifetime appointments to the Court. Once confirmed, justices may hold office for as long as they live or until they voluntarily step down. Such job security in the Federal Government is conferred solely on judges and, by constitutional design, is intended to insure the independence of the Federal judiciary, including the Supreme Court, from the President and Congress.

A President has no power to remove a Supreme Court justice from office. A justice may be removed by Congress, but only through the process of impeachment by the House and conviction by the Senate. Only one justice has ever been impeached (in an episode which occurred in 1804), and he remained in office after being acquitted by the Senate. Many justices serve for 20 to 30 years and sometimes are still on the Court decades after the President who nominated them has left office.

Death of a Sitting Justice. Lifetime tenure, interesting work, and the prestige of the office often result in justices choosing to serve on the Court for as long as possible. Consequently, it has not been unusual, historically, for justices to die while in office. For example, death in office was com-

mon on the Court during the first half of the twentieth century — 14 (or 41 percent) of 34 vacancies between 1900 and 1950 occurred as a result of a justice dying while serving on the Court. Additionally, all five Court vacancies occurring between 1946 and 1954 were due to the death of a sitting justice. Since 1954, however, only two of 24 vacancies occurring on the Court were the result of a justice dying while still in office.

Retirement or Resignation of a Sitting Justice. Since 1954, voluntary retirement has been by far the most common way in which justices have left the bench (20, or 83 percent, of 24 vacancies occurring after 1954 resulted from retirements). In contrast to retirement, resignation (i.e., leaving the bench before becoming eligible for retirement compensation) is rare. In recent history, two justices have resigned from the Court.

Justice Arthur Goldberg resigned in 1965 to assume the post of U.S. ambassador to the United Nations. Justice Abe Fortas resigned four years later, in 1969, after protracted criticism over controversial consulting work while on the bench and a failed nomination to be elevated from associate justice to chief justice. When justices retire or resign, the President is usually notified by formal letter.

Pursuant to a law enacted in 1939, a justice (or any other Federal judge receiving a lifetime appointment) may also retire if "unable because of permanent disability to perform the duties of his office," by furnishing the President a certificate of disability.

Prior to 1939, specific legislation from Congress was required to provide retirement benefits to a justice departing the Court because of disability who otherwise would be ineligible for such benefits, due to insufficient age and length of service. In such circumstances in 1910, for instance, Congress took legislative action granting a pension to Justice William H. Moody. As the *Washington Post* reported at the time, although illness had kept Justice Moody from the bench for "almost a year," he was not yet eligible for retirement.

■ Advice and Consent

As discussed above, the need for a Supreme Court nominee arises when a vacancy occurs on the Court due to the death, retirement, or resignation of a justice (or when a justice announces his or her intention to retire or resign). It then becomes the President's constitutional responsibility to select a successor to the vacating justice, as well as the constitutional responsibility of the Senate to exercise its role in providing "advice and consent" to the President.

The Role of Senate Advice. Constitutional scholars have differed as to how much importance the Framers of the Constitution attached to the word "advice" in the phrase "advice and consent." The Framers, some have maintained, contemplated the Senate performing an advisory, or recommending, role to the President prior to his selection of a nominee, in addition to a confirming role afterwards. Others, by contrast, have insisted that the Senate's "advice and consent" role was meant to be strictly that of determining, after the President's selection had been made, whether to approve the President's choice.

Bridging these opposing schools of thought, another scholar recently asserted that the "more sensible reading of the term 'advice' is that it means that the Senate is constitutionally entitled to give advice to a President on whom as well as what kinds of persons he should nominate to certain posts, but this advice is not binding." — Michael J. Gerhardt, *The Federalist Appointment Process.* Historically, the degree to which Senate advice has been sought or used has varied, depending on the President.

It is a common, though not universal, practice for Presidents, as a matter of courtesy, to consult with Senate party leaders as well as with members of the Senate Judiciary Committee before choosing a nominee. Senators who candidly inform a President of their objections to a prospective nominee may help in identifying shortcomings in that candidate or the possibility of a confirmation battle in the Senate, which the President might want to avoid. Conversely, input from the Senate might draw new Supreme Court candidates to the President's attention, or provide additional reasons to nominate a person who already is on the President's list of prospective nominees.

As a rule, Presidents are also careful to consult with a candidate's home State senators, especially if they are of the same political party as the President. The need for such care is due to the longstanding custom of "senatorial courtesy," whereby senators, in the interests of collegiality, are inclined, though not bound, to support a Senate colleague who opposes a presidential nominee from that Member's state. While usually invoked by home State senators to block lower Federal court nominees whom they find unacceptable, the custom of "senatorial courtesy" has sometimes also played a part in the defeat of Supreme Court nominations.

Besides giving private advice to the President, senators may also counsel a President publicly. A senator, for example, may use a Senate floor statement or issue a statement to the news media indicating support for, or opposition to, a potential Court nominee, or type or quality of nominee, for the purpose of attracting the President's attention and influencing the President's choice.

Advice from Other Sources. Advice, it should be noted, may come to Presidents not only from the Senate but from many other sources. One key source of influence may be high-level advisers within the President's administration. Others who may provide advice include House Members, party leaders, interest groups, news media commentators, and, periodically, justices already on the Court. Presidents are free to consult with, and receive advice from, whomever they choose.

■ Criteria for Selecting a Nominee

While the precise criteria used in selecting a Supreme Court nominee vary from President to President, two general motivations appear to underlie the choices of almost every President. One is the desire to have the nomination serve the President's political interests (in the partisan and electoral senses of the word "political," as well as in the public policy sense); the second is to demonstrate that a search was successfully made for a nominee having the highest professional qualifications.

Political Considerations. Virtually every President is presumed to take into account a wide range of political considerations when faced with the responsibility of filling a Supreme Court vacancy. For instance, most Presidents, it is assumed, will be inclined to select a nominee whose political or ideological views appear compatible with their own.

Specifically, "Presidents are, for the most part, results-oriented. This means that they want justices on the Court who will vote to decide cases consistent with the president's policy preferences." — George L. Watxon and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments.*

The President also may consider whether a prospective nomination will be pleasing to the constituencies upon whom he especially relies for political support or whose support he would like to attract. For political or other reasons, such nominee attributes as party affiliation, geographic origin, ethnicity, religion, and gender may also be of particular importance to the President. A President also might take into account whether the existing "balance" among the Court's members (in a political party, ideological, demographic, or other sense) should be altered. The prospects for a potential nominee receiving Senate confirmation are another consideration.

Even if a controversial nominee is believed to be confirmable, an assessment must be made as to whether the benefits of confirmation will be worth the costs of the political battle to be waged.

Professional Qualifications. Most Presidents also want their Supreme Court nominees to have unquestionably outstanding legal qualifications. Presidents look for a high degree of merit in their nominees not only in recognition of the demanding nature of the work that awaits someone appointed to the Court, but also because of the public's expectations that a Supreme Court nominee be highly qualified.

With such expectations of excellence, Presidents often present their nominees as the best person, or among the best persons, available. Many nominees, as a result, have distinguished themselves in the law (as lower court judges, legal scholars, or private practitioners) or have served as Members of Congress, as Federal administrators, or as governors. Although neither the Constitution nor Federal law requires that a Supreme Court justice be a lawyer, every person nominated to the Court thus far has been.

After the President formally submits a nomination to the Senate (but prior to committee hearings on the nomination), the nominee is evaluated by the American Bar Association's Standing Committee on the Federal Judiciary. The committee stresses that an evaluation focuses strictly on the candidate's "professional qualifications: integrity, professional competence and judicial temperament" and does "not take into account [his or her] philosophy, political affiliation or ideology."

For example, at the time of his nomination by President Harry Truman in 1945, Harold H. Burton was serving as a U.S. senator from Ohio. Since, 1945, the most common type of occupation engaged in by a nominee at the time of his or her nomination has been service as a judge on a U.S. court of appeals (22, or 61 percent, or 36 nominees), followed by service in the Executive Branch (eight, or 22 percent, of 36 nominees). Overall, at least since 1945, it has been relatively rare for a nominee, at the time of nomination, to be serving as a State judge, working as an attorney in private practice, or holding elective office.

Note that the percentage of nominees serving as U.S. appellate court judges at the time of nomination is even greater during relatively recent presidencies. From 1981 to the present, for example, 12 (or 80 percent) of 15 nominees were serving as appellate judges immediately prior to nomination. In contrast, since 1981, no nominees to the Court were engaged in private practice or serving in elective office at the time of nomination.

A President's search for professional excellence in a nominee rarely proceeds without also taking political factors into account. Rather, "more typically," a President "seeks the best person from among a list of those who fulfill certain of these other [political] criteria and, of course, who share a president's vision of the nation and the Court." — Watson and Stookey.

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Appointment of Justices

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Integrity and Impartiality. Closely related to the expectation that a Supreme Court nominee have excellent professional qualifications are the ideals of integrity and impartiality in a nominee. Most Presidents presumably will be aware of the historical expectation, dating back to Alexander Hamilton's pronouncements in the Federalist Papers, that a justice be a person of integrity who is able to approach cases and controversies impartially, without personal prejudice.

In that same spirit, a bipartisan study commission on judicial selection in 1996 declared that it was "most important" to appoint judges who were not only learned in the law and conscientious in their work ethic but who also possessed "what lawyers describe as 'judicial temperament.'" This term, the commission explained, "essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result." Accordingly, Presidents sometimes will cite the integrity or fairness of Supreme Court nominees to buttress the case for their appointment to the Court.

Other Factors. Any given President also might single out other qualities as particularly important for a Supreme Court nominee to have, as President Barack Obama did in 2009, when announcing his nomination of Judge Sonia Sotomayor to the Court. In prefatory remarks to that announcement, President Obama cited selection criteria similar to those mentioned by other recent Presidents, such as "mastery of the law," the "ability to hone in on the key issues and provide clear answers to complex legal questions," and "a commitment to impartial justice." He added, however, that such qualities, while "essential" for anyone sitting on the Supreme Court, "alone are insufficient," and that "[w]e need something more." An additional requisite quality, President Obama said, was "experience," which he explained was:

> Experience being tested by obstacles and barriers, by hardship and misfortune, experience insisting, persisting, and ultimately, overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.

A President, as well, may consider additional factors when the Supreme Court vacancy to be filled is that of the chief justice. Besides requiring that a candidate be politically acceptable, have excellent legal qualifications, and enjoy a reputation for integrity, a President might be concerned that his nominee have proven leadership qualities necessary to effectively perform the tasks specific to the position of chief justice. Such leadership qualities, in the President's view, could include administrative and human relations skills, with the latter especially important in fostering collegiality among the Court's members.

The President also might look for distinction or eminence in a chief justice nominee sufficient to command the respect of the Court's other justices, as well as to further public respect for the Court. A President, too, might be concerned with the age of the chief justice nominee, requiring, for instance, that the nominee be at least of a certain age (to ensure an adequate degree of maturity and experience relative to the other justices) but not above a certain age (to allow for the likely ability to serve as a leader on the Court for a substantial number of years). ■

Vice President's Remarks

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is able to rule on the great issues of the day: Race discrimination. Separation of church and state. Whether there's a right to an abortion — and if so, safe and legal abortion. Police searches. These are actual cases before the Supreme Court of the United States, before the courts. We have to make sure that a fully functioning Supreme Court is in a position to address these significant issues, and that geographic happenstance cannot fragment our national unity.

Our democracy rests upon the twin pillars of basic fairness and justice under law. Every American knows in their gut what they mean. Both these pillars demand that we not trap ordinary Americans in whatever lower court's fate has chosen for them, while letting other, more powerful selectively choose lower courts that best fit their needs.

We can't let one branch of government threaten the equality and rule of law in the name of a patchwork constitution. We must not let justice be delayed or denied as a matter of fundamental rights. We must not let the rule of law collapse because our highest court is being denied its full complement of judges.

I still believe in the promise of the Supreme Court delivering equal justice under law, but it requires nine now. I still believe the voice of the people can be heard in the land if we follow a constitutional path — the path of advice and consent writ large, the path of collaboration in search of common ground. ■