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Supreme Court Appointment Process: President's Selection of a Nominee

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Summary

The appointment of a Supreme Court Justice is an event of major significance in American politics. Each appointment is of consequence because of the enormous judicial power the Supreme Court exercises as the highest appellate court in the federal judiciary. Appointments are usually infrequent, as a vacancy on the nine-member Court may occur only once or twice, or never at all, during a particular President's years in office. Under the Constitution, Justices on the Supreme Court receive what can amount to lifetime appointments which, by constitutional design, helps ensure the Court's independence from the President and Congress.

The procedure for appointing a Justice is provided for by the 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." The process of appointing Justices has undergone changes over two centuries, but its most basic feature—the sharing of power between the President and Senate—has remained unchanged: To receive appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate.

Political considerations typically play an important role in Supreme Court appointments. It is often assumed, for example, that Presidents will be inclined to select a nominee whose political or ideological views appear compatible with their own. The political nature of the appointment process becomes especially apparent when a President submits a nominee with controversial views, there are sharp partisan or ideological differences between the President and the Senate, or the outcome of important constitutional issues before the Court is seen to be at stake.

Additionally, over more than two centuries, a recurring theme in the Supreme Court appointment process has been the assumed need for professional excellence in a nominee. During recent presidencies, nominees have at the time of nomination, most often, served as U.S. appellate court judges. The integrity and impartiality of an individual have also been important criteria for a President when selecting a nominee for the Court.

The speed by which a President selects a nominee for a vacancy has varied during recent presidencies. A President might announce his intention to nominate a particular individual within several days of when a vacancy becomes publicly known, or a President might take multiple weeks or months to announce a nominee. The factors affecting the speed by which a President selects a nominee include whether a President had advance notice of a Justice's plan to retire, as well as when during the calendar year a Justice announces his or her departure from the Court.

On rare occasions, Presidents also have made Court appointments without the Senate's consent, when the Senate was in recess. Such "recess appointments," however, were temporary, with their terms expiring at the end of the Senate's next session. Recess appointments have, at times, been considered controversial because they bypassed the Senate and its "advice and consent" role. The last recess appointment to the Court was made in 1958 when President Eisenhower appointed Potter Stewart as an Associate Justice (Justice Stewart was confirmed by the Senate the following year).

Additional CRS reports provide information and analysis related to other stages of the confirmation process for nominations to the Supreme Court. For a report related to consideration of nominations by the Senate Judiciary Committee, see CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion. For a report related to Senate floor debate and consideration of nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

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Background

The appointment of a Supreme Court Justice is an event of major significance in American politics.[1] 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,"[2] 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)[3] or occur in close proximity to each other (with a particular President afforded several opportunities to name persons to the Court).[4]

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."[5] 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

[1] This scope of this report involves the selection of a nominee to the Supreme Court by the President. For a report providing information and analysis related to consideration of nominations to the Court by the Senate Judiciary Committee, see CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion. For a report providing information and analysis related to floor action on nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

[2] U.S. Supreme Court, *The Supreme Court of the United States* (Washington: Published by the Supreme Court with the cooperation of the Supreme Court Historical Society, revised September 2006), p. 10. (Hereinafter cited as Supreme Court, *Supreme Court of the United States.*)

[3] Of the 43 individuals who served as President of the United States prior to the start of the Donald Trump presidency on January 20, 2017, 6 (Presidents Andrew Johnson, Franklin Pierce, James A. Garfield, William McKinley, Calvin Coolidge, and Gerald R. Ford) made one Supreme Court nomination each, while 3 others (Presidents William Henry Harrison, Zachary Taylor, and Jimmy Carter) were unable to make a single nomination to the Court since no vacancies occurred on the Court during their presidencies. Note that President Andrew Johnson's single nomination to the Court was not approved by the Senate. The remaining 34 Presidents made two or more nominations to the Court. As of this writing, President Trump has made one nomination to the Court and there is one seat that will become vacant—upon the retirement of Anthony Kennedy—on July 31, 2018.

[4] For instance, nine vacancies occurred on the Court during a 5 ½-year period of Franklin D. Roosevelt's presidency, with all of FDR's nine nominations to fill those vacancies confirmed by the Senate. The President with the largest number of Supreme Court confirmations in one term (apart from the first eight of George Washington's nominations—all in his first term, and all confirmed) was William Howard Taft, who, during his four years in office, made six Court nominations, all of which were confirmed by the Senate.

[5] The decision of the Framers at the Constitutional Convention of 1787 to have the President and the Senate share in the appointment of the Supreme Court Justices and other principal officers of the government, one scholar wrote, was a compromise reached between "one group of men [who] feared the abuse of the appointing power by the executive and favored appointments by the legislative body," and "another group of more resolute men, eager to establish a strong national government with a vigorous administration, [who] favored the granting of the power of appointment to the President." Joseph P. Harris, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (Berkeley, CA: University of California Press, 1953; reprint, New York: Greenwood Press, 1968), p. 33. (Hereinafter cited as Harris, *Advice and Consent of the Senate.*)

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.[6] 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.[7] 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.[8]

On June 27, 2018, Justice Anthony Kennedy announced his retirement from the Court, effective July 31, 2018.[9] This report will be further updated upon the selection of a nominee by President Trump.

How Supreme Court Vacancies Occur[10]

Under the Constitution, Justices on the Supreme Court hold office "during good Behaviour,"[11] 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.[12]

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[6] Consider, for example, President John Adams's fateful nomination in 1801 of John Marshall. During his more than 34 years of service as Chief Justice, Marshall, "more than any other individual in the history of the Court, determined the developing character of America's Federal constitutional system" and "raised the Court from its lowly, if not discredited, position to a level of equality with the executive and legislative branches." Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd ed. (New York: Oxford University Press, 1992), p. 83. (Hereinafter cited as Abraham, *Justices and Presidents*.) Looking back on his appointment a quarter century before, Adams in 1826 was quoted as saying, "My gift of John Marshall to the people of the United States was the proudest act of my life." Charles Warren, *The Supreme Court in United States History*, rev. edition, 2 vols. (Boston: Little Brown, 1926), vol. 1, p. 178.

[7] "By well-established custom, the Senate accords the President wide latitude in the selection of the members of his Cabinet, who are regarded as his chief assistants and advisers. It is recognized that unless he is given a free hand in the choice of his Cabinet, he cannot be held responsible for the administration of the executive branch." Harris, *Advice and Consent of the Senate*, p. 259.

[8] The Senate "is perhaps most acutely attentive to its [advise and consent] duty when it considers a nominee to the Supreme Court. That this is so reflects not only the importance of our Nation's highest tribunal, but also our recognition that while Members of the Congress and Presidents come and go ..., the tenure of a Supreme Court Justice can span generations." Sen. Daniel P. Moynihan, debate in Senate on Supreme Court nomination of Ruth Bader Ginsburg, *Congressional Record*, vol. 139, August 2, 1993, p. 18142.

[9] For the text of Justice Kennedy's retirement letter, see CNN, *Read: Justice Anthony Kennedy's retirement letter*, June 27, 2018, available online at https://www.cnn.com/2018/06/27/politics/read-justice-anthony-kennedy-retirement-letter/index.html.

[10] This section of the report uses some text previously published in CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus.

[11] U.S. Constitution, art. III, §1.

[12] Alexander Hamilton, in Federalist Paper 78 ("The Judges as Guardians of the Constitution"), maintained that, while the judiciary was "in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches ... , nothing can contribute so much to its firmness and independence as *permanency in office*." He added that if the courts

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.[13] 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.[14]

Death of a Sitting Justice

The prospect of 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 common on the Court during the first half of the 20th century—14 (or 41%) of 34 vacancies between 1900-1950 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.[15] Since 1954, however, only 2 of 24 vacancies occurring on the Court were the result of a Justice dying while still in office.[16]

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%, of 24 vacancies occurring after 1954 resulted from retirements).

"are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the *permanent tenure* of judicial offices, since *nothing will contribute so much as this to that independent spirit in the judges*...." (Emphases added.) Benjamin Fletcher Wright, ed., *The Federalist by Alexander Hamilton, James Madison, and John Jay* (Cambridge, MA: Belknap Press of Harvard University Press, 1966), p. 491 (first quote) and p. 494 (second quote). (Hereinafter cited as Wright, *The Federalist*.)

[13] In 1804, the House of Representatives voted to impeach Justice Samuel Chase. The vote to impeach Chase, a staunch Federalist and outspoken critic of Jeffersonian Republican policies, was strictly along party lines. In 1805, after a Senate trial, Chase was acquitted after votes in the Senate fell short of the necessary two-thirds majority on any of the impeachment articles approved by the House. "Chase's impeachment and trial set a precedent of strict construction of the impeachment clause and bolstered the judiciary's claim of independence from political tampering." David G. Savage, *Guide to the U.S. Supreme Court*, 4th ed. (Washington: Congressional Quarterly Inc., 2004), vol. 1, p. 258. (Hereinafter cited as Savage, *Guide to the U.S. Supreme Court*.) In a few other instances, Justices have been the object of preliminary House Judiciary Committee inquiries into allegations of conduct possibly constituting grounds for impeachment, but in none of these instances was impeachment recommended by the committee. In another instance, Justice Abe Fortas, on May 14, 1969, resigned from the Court three days after a House Member stated he had prepared articles of impeachment against the Justice, and one day after another House Member proposed that the House Judiciary Committee begin a preliminary investigation into allegations that the Justice was guilty of various ethical violations. See Charles Gardner Geyh, *When Courts & Congress Collide* (Ann Arbor, MI: The University of Michigan Press, 2009), pp. 119-125; Lee Epstein et al., *The Supreme Court Compendium*: *Data, Decisions & Developments*, 4th ed. (Washington: Congressional Quarterly Inc., 2007), p. 428. (Hereinafter cited as Epstein, *Supreme Court Compendium.*); and U.S. Congress, House of Representatives, *Hinds' Precedents of the House of Representatives of the United States*, prepared by Asher C. Hinds, clerk at the Speaker's table (Washington, GPO, 1907), vol. 3, sec. 2508.

[14] A Supreme Court booklet published in 2006 noted that since the formation of the Court in 1790, there had been only 17 Chief Justices and 98 Associate Justices, "with Justices serving for an average of 15 years." Supreme Court, *Supreme Court of the United States*, p. 10.

[15] The five Justices whose deaths created vacancies during this period, in chronological order, were Chief Justice Harlan F. Stone (vacancy created on April 22, 1946), Justice Frank Murphy (July 19, 1949), Justice Wiley B. Rutledge (September 10, 1949), Chief Justice Fred M. Vinson (September 8, 1953), and Justice Robert H. Jackson (October 9, 1954).

[16] Chief Justice William H. Rehnquist died on September 3, 2005. Justice Antonin Scalia died on February 13, 2016.

In contrast to retirement, resignation (i.e., leaving the bench *before* becoming eligible for retirement compensation) is rare.[17] 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.[18] 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.[19] When Justices retire or resign, the President is usually notified by formal letter.[20]

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.[21] 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.[22]

Nomination of a Sitting Justice to Chief Justice Position

When a Chief Justice vacancy arises, the President may choose to nominate a sitting Associate Justice for the Court's top post.[23] If the Chief Justice nominee is confirmed, he or she must, to

[17] Under 28 U.S.C. §371, Supreme Court Justices, like other Article III (tenure "during good Behaviour") federal judges, may *retire*, and be entitled to receive retirement compensation, in one of two ways—either by taking "senior status" or by "retiring from office." Beginning at age 65, they are entitled to receive retirement compensation, if having served a minimum 10 years as an Article III judge, their age and overall Article III judicial experience totals 80 years. (Hence, under this "Rule of 80," a Justice of age 65 must have served 15 years to become eligible for retirement compensation; a Justice of age 66, 14 years; a Justice of age 67, 13 years; etc.) Judges who take senior status retire from regular active service but retain their judicial office and the salary of the office, subject to annual certification of their having performed certain judicial or administrative duties in the preceding year. Judges who retire from office completely relinquish their judicial office with the right to a frozen lifetime annuity equal to the salary of the office at the time of retirement. In contrast, a Justice's *resignation* entails voluntarily relinquishing his or her judicial office without meeting the age and service requirements of the Rule of 80 (and thus being ineligible to receive retirement compensation). See U.S. Administrative Office of the United States Courts, *Senior Status and Retirement for Article III Judges*, April 1999 (Judges Information Series, No. 4), pp. vii-viii.

[18] Carroll Kilpatrick, "Goldberg is Named to Stevenson Post," *Washington Post*, July 21, 1965, p. A1.

[19] On the controversies surrounding Justice Fortas's nomination and resignation, see Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State University of New York Press, 2003), pp. 171-175. (Hereinafter cited as Ward, *Deciding to Leave*); and Philip Warden and Aldo Beckman, "Fortas Agrees to Quit, Nixon Aide Says," *Chicago Tribune*, May 15, 1969, p. 7.

[20] See, for example, the letter submitted by Justice David H. Souter to President Obama, announcing Justice Souter's intention to retire, at http://www.supremecourt.gov/publicinfo/press/DHSLetter.pdf.

[21] The law provides that a Justice retiring under these provisions shall receive for the remainder of his lifetime "the salary he is receiving at the date of retirement" or, if his service was less than 10 years, one-half of that salary. Act of August 5, 1939, ch. 433, 53 Stat. 1204-1205; 28 U.S.C. §372(a).

[22] "Moody Will Retire," *Washington Post*, June 15, 1910, p. 1.

[23] Alternately, a President might nominate an individual not currently serving on the Court to fill the vacant Chief Justice position. Most recently, President G.W. Bush nominated John G. Roberts, Jr., as Chief Justice to fill the vacancy created by the death of Chief Justice Rehnquist. At the time of his nomination, Mr. Roberts was not serving as an Associate Justice on the Court.

assume the new position, resign as Associate Justice, requiring a new nominee from the President to fill the newly vacated Associate Justice seat.

Note, however, that the scenario described above is a relatively rare occurrence. During the 1900-2009 period, Presidents attempted to elevate Associate Justices to Chief Justice four times, with the Senate confirming the nominees on three occasions. Most recently, in 1986, President Ronald Reagan nominated then-Associate Justice William H. Rehnquist to be Chief Justice after Chief Justice Burger announced he was stepping down from the Court.[24] Consequently, President Reagan also nominated Antonin Scalia to fill the Associate Justice vacancy that would ultimately be created by Justice Rehnquist's elevation to Chief Justice.

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).[25] It then becomes the President's constitutional responsibility to select a successor to the vacating Justice,[26] as well as the constitutional responsibility of the Senate to exercise its role in providing "advice and consent" to the President.[27]

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.[28] 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.[29] Bridging these opposing schools of thought, another scholar recently asserted that the

[24] The other Associate Justices nominated for Chief Justice during the period were Edward D. White (1910), Harlan F. Stone (1941), and Abe Fortas (1968). As noted previously, Justice Fortas's nomination failed to receive Senate confirmation.

[25] As noted above, a Supreme Court vacancy also would occur if a Justice were removed by Congress through the impeachment process, but no Justice has ever been removed from the Court in this way. For a comprehensive review of how and why past Supreme Court Justices have left the Court, see Ward, *Deciding To Leave*, pp. 25-223. Ward, in introduction at p. 7, explained that his book, among other things, examines the extent to which Justices, in their retirement decisions, have been "motivated by strategic, partisan, personal, and institutional concerns."

[26] For a book-length examination of how several recent Presidents have selected nominees to serve on the Supreme Court, see David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999). (Hereinafter cited as Yalof, *Pursuit of Justices*.) See also Greenburg, *Supreme Conflict*, which examined in depth the processes followed by the Administrations of Presidents Ronald Reagan, George H. W. Bush, William J. Clinton, and George W. Bush in selecting Supreme Court nominees; and Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover Through George W. Bush* (Charlottesville, VA: University of Virginia Press, 2007).

[27] Article II, Section 2, clause 2 of the U.S. Constitution.

[28] See, for example, John Ferling, "The Senate and Federal Judges: The Intent of the Founding Fathers," *Capitol Studies*, vol. 2, Winter 1974, p. 66: "Since the convention acted at a time when nearly every state constitution, and the Articles of Confederation, permitted a legislative voice in the selection of judges, it is inconceivable that the delegates could have intended something less than full Senate participation in the appointment process."

[29] See, for example, Harris, *Advice and Consent of the Senate*, p. 34: "The debates in the Convention do not support the thesis since advanced that the framers of the Constitution intended that the President should secure the advice—that is, the recommendations—of the Senate or of individual members, before making a nomination."

"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."[30] 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.[31] 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.[32]

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 long-standing 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

[30] Michael J. Gerhardt, *The Federal Appointments Process* (Durham, NC: Duke University Press, 2003), p. 33. (Hereinafter cited as Gerhardt, *The Federal Appointment Process.*) The Constitution, Gerhardt added, "does not mandate any formal pre-nomination role for the Senate to consult with the president; nor does it impose any obligation on the president to consult with the Senate prior to nominating people to confirmable posts. The Constitution does, however, make it clear that the president or his nominees may have to pay a price if he ignores the Senate's advice." Ibid.

[31] "To a certain extent, presidents have always looked to the Senate for recommendations and subsequently relied on a nominee's backers there to help move the nomination through the Senate." George L. Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York, HarperCollins College Publishers, 1995), p. 78. (Hereinafter cited as Watson and Stookey, *Shaping America*.)

[32] President Clinton's search for a successor to retiring Justice Harry A. Blackmun, during the spring of 1994, is illustrative of a President seeking and receiving Senate advice. According to one report, the President, as he came close to a decision after holding his options "close to the vest" for more than a month, "began for the first time to consult with leading senators about his top candidates for the Court seat and solicited advice about prospects for easy confirmation." The advice he received included "sharp Republican opposition to one of his leading choices, Interior Secretary Bruce Babbitt." Gwen Ifill, "Clinton Again Puts Off Decision on Nominee for Court," *The New York Times*, May 11, 1994, p. A16.

In 2005, the Administration of President George W. Bush took pains to engage in a level of consultation with Senators over prospective Supreme Court nominations that White House officials called unprecedented. Prior to the President's nominations to the Court of John G. Roberts Jr., Harriet E. Miers, and Samuel A. Alito Jr., the President and his aides reportedly consulted with, and sought input from, the vast majority of the Senate's Members. Prior to announcing the Miers nomination, for instance, it was reported that "the President and his staff talked with more than 80 Senators." Deb Riechmann, "Bush Expected to Name High Court Nominee," Associated Press Online, September 30, 2005, at http://www.nexis.com. According to a White House spokesman, the more than 80 Senators included all 18 members of the Senate Judiciary Committee and over two-thirds of Senate Democrats. Steve Holland, "Bush Completes Consultations, Nears Court Decision," Reuters News, September 30, 2005, at http://global.factiva.com.

Likewise, in 2009, President Barack Obama consulted Senators prior to selecting Sonia Sotomayor to succeed outgoing Justice David Souter. Announcing the nomination of Judge Sotomayor to the Court, President Obama said the selection process had been "rigorous and extensive" and included seeking "the advice of Members of Congress on both sides of the aisle, including every member of the Senate Judiciary Committee." U.S. President (Obama, Barack H.), "Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice," *Daily Compilation of Presidential Documents*, May 26, 2009, DCPD-200900402, p. 1

court nominees whom they find unacceptable, the custom of "senatorial courtesy" has sometimes also played a part in the defeat of Supreme Court nominations.[33]

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.[34]

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.[35] Others who may provide advice include House Members, party leaders, interest groups, news media commentators, and, periodically, Justices already on the Court.[36] Presidents are free to consult with, and receive advice from, whomever they choose.

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[33] "Numerous instances of the application of senatorial courtesy are on record, with the practice at least partially accounting for rejection of several nominations to the Supreme Court." Henry J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, new and rev. ed. (New York: Rowman & Littlefield Publishers, 1999), pp. 19-20. (Hereinafter cited as Abraham, *Justices, Presidents and Senators*.) Senatorial courtesy, Abraham wrote, appeared to have been the sole factor in President Grover Cleveland's unsuccessful nominations of William B. Hornblower (1893) and Wheeler H. Peckham (1894), both of New York. Each was rejected by the Senate after Senator David B. Hill (D-NY) invoked senatorial courtesy.

[34] In 1987, for instance, some Senators publicly warned President Reagan that he could expect problems in the Senate if he nominated U.S. appellate court judge Robert H. Bork to replace vacating Justice Lewis F. Powell. Among them, Sen. Robert C. Byrd (D-WV) said the Reagan Administration would be "inviting problems" by nominating Bork. The chair of the Senate Judiciary Committee, Joseph R. Biden Jr. (D-DE), said that, while Bork was a "brilliant man," it did "not mean that there should be six or seven or eight or even five Borks" on the Court. Helen Dewar and Howard Kurtz, "Byrd Threatens Stall on Court Confirmation," *The Washington Post*, June 30, 1987, p. A7. In what was regarded as a thinly veiled reference to a possible Bork nomination, Senate Majority Whip Alan Cranston (D-CA) called on Senate Democrats to form a "solid phalanx" to block an "ideological court coup" by President Reagan. Al Kamen and Ruth Marcus, "Nomination to Test Senate Role in Shaping of Supreme Court," *The Washington Post*, July 1, 1987, p. A9. President Reagan, nonetheless, nominated Judge Bork, only to have the nomination meet widespread Senate opposition and ultimate Senate rejection.

[35] Modern Presidents, one scholar wrote, "are often forced to arbitrate among factions within their own administrations, each pursuing its own interests and agendas." In recent Administrations, he maintained, the final choice of a nominee "has usually reflected one advisor's hard-won victory over his rivals, without necessarily accounting for the president's other political interests." Yalof, *Pursuit of Justices*, p. 3. During the G.H.W. Bush presidency, for example, several of the President's advisors disagreed as to their first preference for the Brennan vacancy. Of potential nominees, "eventually the names were winnowed to two: David Souter and Edith Jones of the Fifth Circuit Court of Appeals. 'The one that was really pushing very strongly for [Souter] was [White House Counsel] Boyden [Gray]', ... when President Bush took a straw poll of his judicial selection team (Sununu, Gray, Thornburgh, and Vice President Dan Quayle), the result was a split decision. Thornburg recalls that he and Gray supported Souter, while Sununu and Quayle preferred Jones." Barbara A. Perry and Henry J. Abraham, "From Oral History to Oral Argument: George Bush's Supreme Court Appointments," in *41: Inside the Presidency of George H.W. Bush*, ed. Michael Nelson and Barbara A. Perry (Ithaca: Cornell University Press, 2014), pp. 170-171 (Hereinafter cited as Perry and Abraham, *Oral History to Oral Argument*).

[36] For numerous examples of Justices advising Presidents regarding Supreme Court appointments, both in the 19th and 20th centuries, see Abraham, *Justices, Presidents and Senators*, pp. 21-23; see also in Abraham's earlier work, *Justices and Presidents*, pp. 186-187 (Chief Justice William Howard Taft's influence over President Warren G. Harding); pp. 233-234 (Justice Felix Frankfurter's advice to President Franklin D. Roosevelt); p. 243 (former Chief Justice Charles Evans Hughes's and former Justice Owen J. Roberts's advice to President Harry S Truman); and pp. 305-306 (Chief Justice Warren Burger's advice to President Richard M. Nixon).

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."[37]

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.[38] 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.[39]

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,[40]

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[37] Watson and Stookey, *Shaping America*, pp. 58-59.

[38] Considerations of geographic representation, for example, influenced President George Washington in 1789, to divide his first six appointments to the Court between three nominees from the North and three from the South. See Watson and Stookey, *Shaping America*, p. 60, and Abraham, *Justices, Presidents, and Senators*, pp. 59-60. In terms of demographic representation, President Reagan in 1981, for example, was sensitive to the absence of any female Justices on the Court. In announcing his choice of Sandra Day O'Connor to replace vacating Justice Potter Stewart, President Reagan noted that "during my campaign for the Presidency, I made a commitment that one of my first appointments to the Supreme Court vacancy would be the most qualified woman that I could possibly find." U.S. President (Reagan), "Remarks Announcing the Intention To Nominate Sandra Day O'Connor To Be an Associate Justice of the Supreme Court of the United States, July 7, 1981," *Public Papers of the Presidents of the United States, Ronald Reagan, 1981* (Washington: GPO, 1982), p. 596

[39] While the "desire to appoint justices sympathetic to their own ideological and policy views may drive most presidents in selecting judges," the field of potentially acceptable nominees for most presidents, according to Watson and Stookey, is narrowed down by at least five "subsidiary motivations"—(1) rewarding personal or political support, (2) representing certain interests, (3) cultivating political support, (4) ensuring a safe nominee, and (5) picking the most qualified nominee. Watson and Stookey, *Shaping America*, p. 59.

[40] Commenting on the nature of the Court's work, and the degree of qualification required of those who serve on the Court, the ABA states the following: "The significance, range and complexity of the issues considered by the justices,

but also because of the public's expectations that a Supreme Court nominee be highly qualified.[41] With such expectations of excellence, Presidents often present their nominees as the best person, or among the best persons, available.[42] 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.[43] 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.[44]

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."[45]

Figure 1 reports, from 1945 to the present, the type of professional position or occupation held by an individual at the time of his or her nomination to the Supreme Court.[46] So, for example, at the

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as well as the finality and nation-wide impact of the Supreme Court's decisions, are among the factors that require the appointment of a nominee of exceptional ability." American Bar Association, *ABA Standing Committee on the Federal Judiciary: What It Is and How it Works*, p. 10, online at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf.

[41] One of the "unwritten codes," two scholars on the judiciary have written, "is that a judicial appointment is different from run-of-the-mill patronage. Thus, although the political rules may allow a president to reward an old ally with a seat on the bench, even here tradition has created an expectation that the would-be judge have some reputation for professional competence, the more so as the judgeship in question goes from the trial court to the appeals court to the Supreme Court level." Robert A. Carp and Ronald A. Stidham, *Judicial Process in America*, 3rd ed. (Washington: CQ Press, 1996), pp. 240-241.

[42] President Gerald R. Ford, for example, said he believed his nominee, U.S. appellate court judge John Paul Stevens, "to be best qualified to serve as an Associate Justice of the Supreme Court." U.S. President (Ford), "Remarks Announcing Intention To Nominate John Paul Stevens To Be an Associate Justice of the Supreme Court, November 28, 1975," *Public Papers of the Presidents of the United States, Gerald R. Ford, 1975*, Book II (Washington: GPO, 1977), p. 1917. And President Obama, for example, stated that his nominee, U.S. appellate court judge Merrick Garland, is "widely recognized" as "one of America's sharpest legal minds" and someone who is "uniquely prepared" to serve as a Justice on the Supreme Court. U.S. President (Obama), "Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court," March 16, 2016, Office of the Press Secretary, The White House. Most recently, President Trump characterized his nominee to the Court, Neil Gorsuch, as having "outstanding legal skills, a brilliant mind, [and] tremendous discipline..." U.S. President (Trump), "Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court," *New York Times*, January 31, 2017.

[43] For lists of the professional, educational, and political backgrounds of every Justice serving on the Court from 1790 to 2007, see Epstein, *Supreme Court Compendium*, pp. 291-341.

[44] A legal scholar notes that while the Constitution "does not preclude a president from nominating nonlawyers to key Justice Department posts or federal judgeships," the delegates to the constitutional convention and the ratifiers "did occasionally express their expectation that a president would nominate qualified people to federal judgeships and other important governmental offices; but those comments were expressions of hope and concern about the consequences of and the need to devise a check against a president's failure to nominate qualified people, particularly in the absence of any constitutionally required minimal criteria for certain positions." Gerhardt, *The Federal Appointments Process*, p. 35.

[45] American Bar Association, *The ABA Standing Committee on the Federal Judiciary: What It Is and How It Works*, p. 1, at http://www.abanet.org/scfedjud/federal_judiciary09.pdf. The role of the ABA in evaluating the President's nominee is discussed further in CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion.

[46] Consequently, the table does not indicate every occupation or profession held by a nominee. Justice Vinson, for example, was serving as Secretary of the Treasury at the time of his nomination to the Court—but his professional experiences prior to his nomination also included service as a U.S. representative from Kentucky, a county prosecutor,

time of his nomination by President Truman in 1945, Harold H. Burton was serving as a U.S. Senator from Ohio. Since 1945, the most common type of professional experience at the time of his or her nomination has been service as a federal appellate court judge (23, or 62%, of 37 nominees),[47] followed by service as an official in the executive branch (8, or 22%, of 37 nominees).[48] 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, 13 (or 81%) of 16 nominees were serving as appellate judges immediately prior to nomination.[49] 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."[50]

and work as an attorney in private practice.

[47] Of the 23 nominees who were serving as U.S. circuit court judges at the time of being nominated to the Supreme Court, the average number of years of service as a circuit court judge prior to a President announcing their nomination was 7.3 years (the median was 5.4 years). The five nominees who served as circuit court judges for the least amount of time prior to having their nomination to the Court announced by a President were David Souter (served less than 3 months, nominated by President G.H.W. Bush), G. Harrold Carswell (7 months, President Nixon), Charles E. Whittaker (9 months, President Eisenhower), John Marshall Harlan II (9 months, President Eisenhower), and Douglas H. Ginsburg (1 year, President Reagan). Of the five, Carswell and Ginsburg were not confirmed. The five nominees who served as circuit court judges for the greatest amount of time prior to having their nomination to the Court announced by a President were Merrick Garland (19 years, nominated by President Obama), Samuel Alito Jr. (15.5 years, G.W. Bush), Stephen Breyer (13.4 years, Clinton), Warren E. Burger (13.2 years, Nixon), and Ruth Bader Ginsburg (13.0 years, Clinton). The most recent nominee to the Court, Neil Gorsuch, served approximately 10.5 years as a circuit court judge prior to his nomination.

[48] The eight executive branch nominees include one who had served as White House Counsel (Harriet Miers), two as solicitor general of the United States (Elena Kagan, Thurgood Marshall), two as deputy or assistant attorneys general (William Rehnquist, Byron White) and three as Cabinet secretaries (Arthur Goldberg—Secretary of Labor, Tom Clark—Attorney General, Frederick Vinson—Secretary of the Treasury).

[49] One scholar has observed that "[r]ather than following historical practice and nominating prominent politicians to the Court, presidents over the last several decades have used the courts, especially the federal circuit courts, as a primary and nearly exclusive recruiting pool....Recent service on a U.S. court of appeals is certainly no guarantee of confirmation or an easy confirmation process, but recent presidents apparently believe that it contributes to confirmation success." Terri L. Peretti, "Where have all the politicians gone? Recruiting for the modern Supreme Court," *Judicature*, vol. 91, no. 3, November-December 2007, pp. 112, 117.

[50] Watson and Stookey, *Shaping America*, p. 64. Recently, for example, prior to the 2016 general election, Donald Trump released a list of individuals he would consider nominating, if elected, to the Supreme Court. He stated "These individuals were selected, first and foremost, based on constitutional principles, with input from respected conservative leaders." Donald J. Trump for President, *Press Release*, September 23, 2016. Updated list (as of November 17, 2017) available online at https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/.

Figure 1. Type of Professional Experience of U.S. Supreme Court Nominees at Time of Nomination

(1945-Present)

			Professional Experience at Time of Nomination					
Nominating President	Nominee	Year Nominated	U.S. Circuit Court Judge	State Judge	Exec. Branch Official	Private Practice	Governor	Senator
Trump	Gorsuch	2017	●	○	○	○	○	○
Obama	Garland*	2016	●	○	○	○	○	○
Obama	Kagan	2010	○	○	●	○	○	○
Obama	Sotomayor	2009	●	○	○	○	○	○
Bush, G.W.	Alito	2005	●	○	○	○	○	○
Bush, G.W.	Miers*	2005	○	○	●	○	○	○
Bush, G.W.	Roberts	2005	●	○	○	○	○	○
Clinton	Breyer	1994	●	○	○	○	○	○
Clinton	Ginsburg	1993	●	○	○	○	○	○
Bush, G.H.W.	Thomas	1991	●	○	○	○	○	○
Bush, G.H.W.	Souter	1990	●	○	○	○	○	○
Reagan	Kennedy	1987	●	○	○	○	○	○
Reagan	Ginsburg**	1987	●	○	○	○	○	○
Reagan	Bork*	1987	●	○	○	○	○	○
Reagan	Scalia	1986	●	○	○	○	○	○
Reagan	O'Connor	1981	○	●	○	○	○	○
Ford	Stevens	1975	●	○	○	○	○	○
Nixon	Rehnquist	1971	○	○	●	○	○	○
Nixon	Powell	1971	○	○	○	●	○	○
Nixon	Blackmun	1970	●	○	○	○	○	○
Nixon	Carswell*	1970	●	○	○	○	○	○
Nixon	Haynsworth*	1969	●	○	○	○	○	○
Nixon	Burger	1969	●	○	○	○	○	○
Johnson	Thornberry*	1968	●	○	○	○	○	○
Johnson	Marshall	1967	○	○	●	○	○	○
Johnson	Fortas	1965	○	○	○	●	○	○
Kennedy	White	1962	○	○	●	○	○	○
Kennedy	Goldberg	1962	○	○	●	○	○	○
Eisenhower	Stewart***	1959	●	○	○	○	○	○
Eisenhower	Whittaker	1957	●	○	○	○	○	○
Eisenhower	Brennan***	1957	○	●	○	○	○	○
Eisenhower	Harlan	1955	●	○	○	○	○	○
Eisenhower	Warren***	1954	○	○	○	○	●	○
Truman	Minton	1949	●	○	○	○	○	○
Truman	Clark	1949	○	○	●	○	○	○
Truman	Vinson	1946	○	○	●	○	○	○
Truman	Burton	1945	○	○	○	○	○	●

Source: Congressional Research Service.

Notes: This figure identifies, for nominees to the U.S. Supreme Court from 1945 to the present, the type of professional experience at the time of nomination to the Court.

* Nomination returned to or withdrawn by the President or rejected by the Senate.

** President announced intention to nominate but did not formally submit nomination to Senate.

*** Received recess appointment to the Court during the preceding calendar year. The year listed is the year in which the nomination was approved by the Senate.

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.[51] 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."[52] Accordingly, Presidents sometimes will cite the integrity or fairness of Supreme Court nominees to buttress the case for their appointment to the Court.[53]

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."[54] 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

[51] In Federalist Paper 78 ("Judges as Guardians of the Constitution"), Hamilton extolled the "benefits of the integrity and moderation of the Judiciary," which, he said, commanded "the esteem and applause of all the virtuous and disinterested." Further, he maintained, there could "be but few men" in society who would "unite the requisite integrity with the requisite knowledge" to "qualify them for the stations of judges." Wright, *The Federalist*, p. 495 (first quote) and p. 496 (second quote).

[52] Miller Center of Public Affairs, *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges* (Charlottesville, VA: University of Virginia, May 1996), p. 10.

[53] In 2005, for example, in announcing the nomination of Samuel A. Alito Jr. to be an Associate Justice, President George W. Bush said he was confident that the Senate would be impressed not only by Judge Alito's "distinguished record" but also by his "measured judicial temperament and his tremendous personal integrity." U.S. President (Bush, George W.), "Remarks Announcing the Nomination of Samuel A. Alito Jr., To Be an Associate Justice of the United States Supreme Court," *Weekly Compilation of Presidential Documents*, vol. 41, November 7, 2005, p. 1626. In describing Merrick Garland, President Obama stated that Judge Garland "brings to his work a spirit of decency, modesty, integrity, even-handedness, and excellence." U.S. President (Obama), "Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court," March 16, 2016, Office of the Press Secretary, The White House. The most recent nominee to the Court, Neil Gorsuch, was described by President Trump as having been "taught the value of independence, hard work and public service." U.S. President (Trump), "Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court," *New York Times*, January 31, 2017.

[54] U.S. President (Obama, Barack H.), "Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice," *Daily Compilation of Presidential Documents*, May 26, 2009, DCPD-200900402, p. 1.

> 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.[55]

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.[56]

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 insure 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).[57]

Background Investigations

An important part of the selection process involves investigating the background of prospective nominees. In recent years the investigative effort generally has followed two primary tracks—one concerned with the public record and professional credentials of a person under consideration, the other with the candidate's private background. The private background investigation, which includes examination of a candidate's personal financial affairs, is conducted by the Federal Bureau of Investigation (FBI). The investigation into a candidate's public record and professional abilities ordinarily is headed by high Justice Department officials, White House aides, or both, working together.

The investigative process may be preliminary in nature when the objective is to identify potential candidates and consider their relative merits based on information already known or readily available. The investigations become more intensive as the initial list is narrowed. The object then becomes to learn as much as possible about the prospective nominees—to accurately gauge their qualifications and their compatibility with the President's specific requirements for a nominee, and, simultaneously, to flag anything in their backgrounds that might be disqualifying or

[55] Ibid. President Obama's announcement of his nomination of Merrick Garland included similar statements about the need for a certain type of experience beyond a nominee's outstanding legal qualifications. President Obama stated "At the same time, Chief Judge Garland is more than just a brilliant legal mind. He's someone who has a keen understanding that justice is about more than abstract legal theory; more than some footnote in a dusty casebook. His life experience ... informs his view that the law is more than an intellectual exercise. He understands the way law affects the daily reality of people's lives." U.S. President (Obama), "Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court," March 16, 2016, Office of the Press Secretary, The White House.

[56] See, for example, Greenburg, *Supreme Conflict*, pp. 238-243 (discussing the assessment of the Administration of President George W. Bush in 2005 that John G. Roberts's leadership abilities and interpersonal skills were important qualities needed in a person under consideration for appointment to be Chief Justice).

[57] The selection of Earl Warren for Chief Justice by President Eisenhower, for example, was due in part to Mr. Warren's relatively young age (62) at the time of appointment. According to one report, President Eisenhower indicated "that he had been looking over other [potential nominees], but felt they were too old for the post. Naturally, he said, he wanted a man who was healthy, strong, who had not had any serious illnesses, and who was relatively young." Edward T. Folliard, "Ike Names Warren to High Bench," *The Washington Post*, October 1, 1953, p. 2, col. 1.

jeopardize their chances for Senate confirmation. For help in evaluating the backgrounds of Court candidates, Presidents sometimes also have enlisted the assistance of private lawyers,[58] legal scholars,[59] or, on rare occasions, the American Bar Association (ABA).[60] Near the culmination of this investigative effort, the President might want to personally meet with one or more of the candidates before finally deciding whom to nominate.[61]

During the prenomination phase, Presidents vary in the degree to which they publicly reveal the names of individuals under consideration for the Court. Sometimes, Presidents seek to keep confidential the identity of their Court candidates. Such secrecy may allow a President to reflect on the qualifications of prospective nominees, and the background investigations to proceed, away from the glare of publicity, news media coverage, and outside political pressures. Other times, the White House may, at least in the early prenomination stage, reveal the names of Supreme Court candidates being considered. Such openness may be intended to serve various purposes—among them, to test public or congressional reaction to potential nominees, please political constituencies who would identify with identified candidates, or demonstrate the President's determination to conduct a comprehensive search for the most qualified person available.

An Administration, of course, need not wait until a vacancy occurs on the Court to begin investigating the backgrounds of potential nominees. Immediately after President George W. Bush was sworn into office in 2001, according to a recent book on Supreme Court nominations,

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[58] Perhaps the most extensive use of private attorneys for this purpose was made by President Clinton in the spring of 1993 during his consideration of candidates to fill the Supreme Court seat of retiring Justice Byron White. President Clinton, it was reported, utilized a team of 75 lawyers in the Washington, DC, area, who "pore[d] over briefs," analyzed "mountains of opinions and speeches" and "comb[ed] through financial records," of the "final contenders" for the Court appointment—from whom the President ultimately selected U.S. appellate court judge Ruth Bader Ginsburg. The team funneled their analyses to the White House counsel, "who, along with other aides, advised the president during the search for a justice." Under the team's ground rules, its work was performed on a confidential basis, with contact between its lawyers and White House aides prohibited. Private attorneys were relied on in this way at least partly because, at that early point in the Clinton presidency, a judicial search team for the Administration was not yet in place in the Department of Justice. Daniel Klaidman, "Who Are Clinton's Vetters, and Why the Big Secret?" *Legal Times*, vol. 16, June 21, 1993, pp. 1, 22-23.

[59] "During President Gerald R. Ford's search to fill a high court vacancy, Attorney General Edward Levi discreetly asked a small group of distinguished constitutional scholars to review opinions and other legal writings of a number of candidates." Ibid. (Klaidman), p. 23.

[60] Three Presidents—Dwight D. Eisenhower in 1957, Richard M. Nixon in 1971, and Gerald R. Ford in 1975—requested the ABA's Standing Committee on Federal Judiciary to evaluate the names of prospective Supreme Court candidates. Typically, however, the ABA committee is not invited by an Administration to evaluate candidates under consideration for nomination to the Court. Instead, the committee performs its evaluation role later, after the President has selected a nominee, providing its evaluation of the nominee to the Senate Judiciary Committee prior to the start of confirmation hearings. See generally CRS Report 96-446, *The American Bar Association's Standing Committee on Federal Judiciary: A Historical Overview*, by Denis Steven Rutkus (out of print, available to congressional clients from author upon request; hereinafter cited as CRS Report 96-446, *ABA Historical Overview*), for a narrative tracing the evolution of the ABA committee's role from the 1940s to 1995, and specifically pp. 8-9, 31-32, and 35 regarding its role in advising Eisenhower, Nixon, and Ford, respectively.

[61] The five most recent Presidents—Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama—all personally interviewed their final candidates before selecting a nominee. "Both Reagan and the elder Bush relied more on their staffs to pare down the list of nominees. They interviewed one or, at most, two prospects before making their decision, compared to the five George W. Bush interviewed to replace Sandra Day O'Connor." Greenburg, *Supreme Conflict*, p. 314. Sonia Sotomayor, nominated to the Court in 2009 by President Obama, was reportedly one of four candidates whom the President interviewed. Ruth Marcus, "An Easy Choice for Obama," *The Washington Post*, May 27, 2009, p. A19. Likewise, Elena Kagan, nominated to the Court in 2010 by President Obama, was reportedly also one of four candidates whom the President interviewed (and "was one of Mr. Obama's runners-up" the year before when he nominated Sonia Sotomayor to the Court). Peter Baker and Jeff Zeleny, *The New York Times*, May 10, 2010, p. 1.

"his staff began putting together a list of potential nominees and conducting extensive background research on them." The book continued:

> Officials believed [Chief Justice William H.] Rehnquist was likely to retire in the summer of 2001, and they were determined to be ready. Each young lawyer in the White House counsel's office, most of whom had clerked on the Supreme Court, was assigned a candidate and made responsible for writing a lengthy report about him or her. In the late spring, then-White House counsel Alberto Gonzalez and his deputy Tim Flanigan began secretly interviewing some of those possible replacements.

The advance work was designed to ensure that George W. Bush would be prepared when a Justice stepped down. The early in-depth research and interviews with prospective nominees were important in ensuring Bush would have coolheaded advice, removed from any external political pressure to select a particular nominee in the hours after a retirement.[62]

Speed by Which a President Selects a Nominee

Figure 2 shows the number of days that elapsed between the date on which it was publicly known that a Justice was leaving the Court and the date on which the President publicly identified a nominee to replace the departing Justice.[63] Note that the figure only shows those vacancies on the Court, since 1975, which required only one nomination to be filled. Consequently, the vacancy created by the death of Justice Scalia is not included in **Figure 2** (since more than one nomination was made to fill it).

When a Justice steps down from the Court (or announces his or her intention to do so), Presidents sometimes move quickly, selecting their nominee within a week of the vacancy being announced. Presidents Reagan and George H. W. Bush, for instance, selected most of their Supreme Court nominees quickly, within days of the vacating Justices publicly announcing their retirements from the Court.[64]

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[62] Greenburg, *Supreme Conflict*, p. 241.

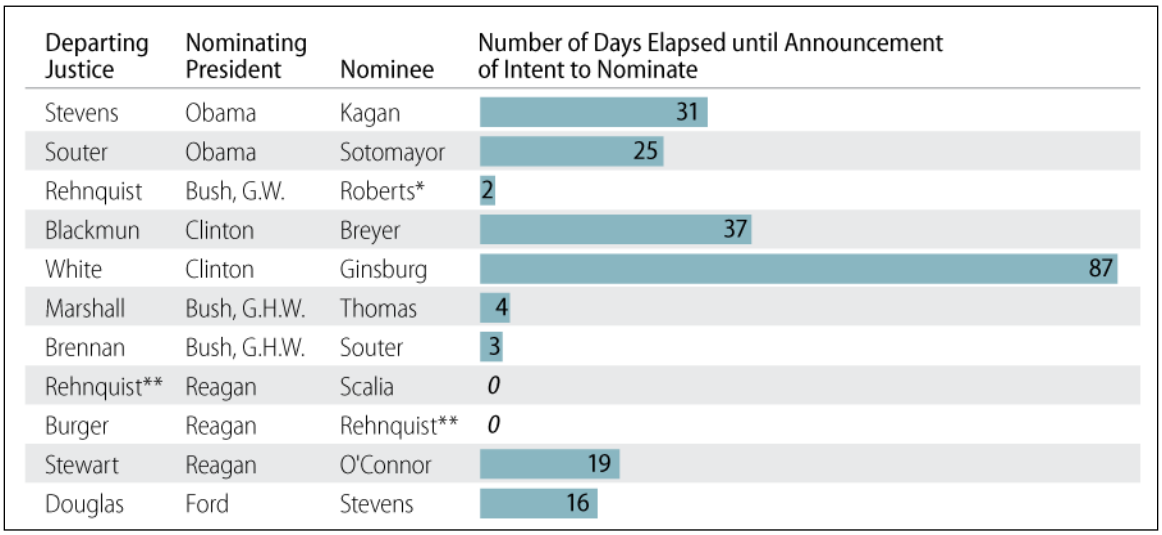
[63] There is no constitutional requirement that a departing Justice give the President advance notice of his or her intention to step down from the Court. Nonetheless, a President sometimes learns in advance from a Justice that he or she plans to publicly announce, on a future date, that he or she is leaving the Court. For example, Justice Harry A. Blackmun told President Clinton through an informal conversation of his decision to retire more than four months before the Justice's decision became public on April 6, 1994. In contrast, Justice O'Connor did not appear to have given President G.W. Bush any advance notice when she publicly announced her retirement via formal letter on July 1, 2005. Although some Presidents learn in advance of a Justice's intention to retire or resign, the dates used in the calculations for **Figure 2** are those in which it was *publicly* known that a Justice was stepping down from the Court. Additionally, the date a President publicly announced whom he intended to nominate to replace the departing Justice might be different from the date that the nominee's nomination was formally submitted by the President to the Senate. For the purposes of this report, the date a President publicly announces whom he intends to nominate, rather than the date the nomination is formally submitted to the Senate, is used as the end-point in measuring the number of days it takes for a President to select a nominee.

[64] In a "surprise announcement" on June 17, 1986, President Reagan announced the retirement of Chief Justice Warren Burger, as well as his selection of Associate Justice William Rehnquist as Burger's replacement, and his intention to nominate, upon Rehnquist's confirmation as Chief Justice, Judge Antonin Scalia as an Associate Justice. Elder Witt, "Rehnquist to Be Chief Justice, Reagan Names Scalia to Court," *Congressional Quarterly*, June 21, 1986, p. 1399. Of the vacancies included in **Figure 2**, this is the only instance of an anticipated future vacancy on the Court being publicly announced on the same date as a President announcing his nominee for that same vacancy.

President G.H.W. Bush took only several days to announce nominees to fill the two vacancies that occurred during his presidency. According to one source, "in Souter, the president saw a perfect nominee for the times: a brilliant jurist who represented the best of American virtues and exhibited no vices or controversial positions on judicial issues....Souter's obscurity became the deciding factor in his favor and gave him the nod over Jones, [another finalist]

Figure 2. Number of Days from Vacancy Announcement of Departing Justice to President's Public Announcement Identifying Nominee for Vacancy

(Vacancies Since 1975 that Required Only One Nomination Prior to Being Filled)



Source: Congressional Research Service

Notes: This figure shows, for select vacancies since the Gerald Ford presidency, the number of days that elapsed from the public vacancy announcement of a departing Justice to the President's public announcement identifying his nominee for the vacancy. The figure does not include three vacancies during this period that required multiple nominations by a President in order for the vacancy to be filled—specifically, the vacancies created by the departures of Justice Lewis Powell, Justice Sandra Day O'Connor, and Justice Antonin Scalia (see the text of the report for additional information).

* John G. Roberts Jr. was initially nominated to the judgeship being vacated by Justice Sandra Day O'Connor. President G.W. Bush nominated Mr. Roberts **18 days** after Justice O'Connor submitted her retirement letter to the President. Following the death of Chief Justice William Rehnquist, the Roberts nomination was withdrawn by President Bush and Mr. Roberts was subsequently renominated by President Bush to replace Chief Justice Rehnquist. Mr. Roberts was renominated **2 days** after Chief Justice Rehnquist's death.

** William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Justice Rehnquist's elevation to the Chief Justice position would itself create a vacancy for an Associate Justice, to which Mr. Scalia was nominated.

President Clinton, in contrast, took more time in selecting his two Supreme Court nominees, nominating Ruth Bader Ginsburg on June 22, 1993, nearly three months after the retirement announcement of Justice Byron R. White, and nominating Stephen G. Breyer on May 17, 1994, approximately five weeks after the retirement announcement of Justice Harry A. Blackmun.

Likewise, President George W. Bush's first two Supreme Court selections were not made immediately upon the heels of a Justice's retirement announcement: President Bush announced

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whose opinions on the federal bench were more controversial. With a stunned candidate at his side, Bush announced Souter's nomination on the same day he met him for the first time, a mere seventy-two hours after Brennan announced his retirement from the bench." Perry and Abraham, *Oral History to Oral Argument*, pp. 172-173.

As for the nomination of Clarence Thomas, Judge Thomas had been included on the list of potential nominees for the Brennan vacancy (to which Souter was nominated)—this may have contributed to the speed by which he was nominated for the Marshall vacancy. As recounted by former attorney general Thornburg, by the time a second vacancy occurred, Judge Thomas "had a degree of seasoning on the D.C. Circuit...we [the selection team] went through the usual suspects and I think the consensus was that Clarence was the choice." Ibid., p. 175.

his choice of John G. Roberts Jr. to succeed Sandra Day O'Connor 18 days after she submitted her retirement letter to the President, and he announced his choice of Harriet E. Miers to succeed Justice O'Connor 28 days after withdrawing the aforementioned Roberts nomination.[65] President Bush did, however, move much more swiftly in selecting a nominee to succeed Chief Justice William H. Rehnquist, announcing his choice of John G. Roberts Jr. for that office two days after the death of Chief Justice Rehnquist on September 3, 2005.[66]

Most recently, President Obama's three Supreme Court selections were made within approximately one month of an incumbent Justice departing the Court. He selected Sonia Sotomayor 25 days after Justice David Souter announced he was leaving the Court; Elena Kagan 31 days after Justice Stevens announced his retirement; and Merrick Garland 32 days following the death of Justice Scalia.

Vacancies That Have Had Multiple Nominations

As noted previously, **Figure 2** includes only those vacancies on the Court, occurring since 1975, that did not have multiple nominations by a President in order for the vacancy to be filled. Specifically, since 1975, there have been three vacancies on the Court that had more than one nomination by a President in order for the vacancy to be filled—the most recent being the vacancy created on the Court by the death of Justice Scalia.

The Powell Vacancy

The first vacancy during this period that had multiple nominations was the vacancy created by the departure of Justice Lewis Powell in 1987. President Reagan first nominated Robert Bork, an appellate judge on the D.C. Circuit, to fill the vacancy; Judge Bork was nominated five days after Justice Powell announced his retirement. The Bork nomination was ultimately rejected by the Senate and, as a result, President Reagan announced his intention to nominate Douglas H. Ginsburg, another appellate judge on the D.C. Circuit. President Reagan announced his intention to nominate Judge Ginsburg six days after the Bork nomination was rejected by the Senate. Judge Ginsburg was never formally nominated, and four days later Mr. Ginsburg withdrew his name from consideration,[67] President Reagan nominated Anthony Kennedy (whose nomination was ultimately approved by the Senate).

Altogether, a total of 138 days, or approximately 4.5 months, elapsed from Justice Powell announcing his retirement to President Reagan nominating Anthony Kennedy to the vacancy.[68]

[65] The vacancy created by the retirement of Sandra Day O'Connor is not included in **Figure 2**. The O'Connor vacancy was one of two vacancies since 1975 that required multiple nominations for the vacancy to be filled. See the text below the figure for a discussion of the O'Connor vacancy.

[66] Likewise, as discussed in the text below, President G.W. Bush moved swiftly in selecting a third nominee to succeed Justice O'Connor, announcing his choice of Samuel A. Alito Jr. for that office on October 31, 2005, four days after the Miers nomination to that office was withdrawn.

[67] After it was disclosed that Judge Ginsburg occasionally smoked marijuana while a college student in the 1960s and on a few occasions in the 1970s, Judge Ginsburg requested that his nomination be withdrawn. George Archibald and Mary Belcher, "Ginsburg Confesses He Used Marijuana," *The Washington Post,* November 6, 1987. See also Steven V. Roberts, "Ginsburg Withdraws Name As Supreme Court Nominee, Citing Marijuana 'Clamor,'" *The New York Times,* November 8, 1987.

[68] This total includes any days in which the Bork nomination was pending, as well as days in which the prospective nomination of Judge Ginsburg was pending prior to the Kennedy nomination.

The O'Connor Vacancy

The second vacancy that had multiple nominations to be filled was the vacancy created by the retirement of Justice Sandra Day O'Connor. Eighteen days elapsed from Justice O'Connor's announcement that she would step down from the Court (contingent upon the confirmation of her successor) to President G.W. Bush's nomination of John Roberts Jr. to replace her. The Roberts nomination was later withdrawn by the President (in order for Mr. Roberts to be re-nominated to fill the vacancy in the Chief Justice position arising from Justice Rehnquist's death); 28 days after the withdrawal of the Roberts nomination, President Bush nominated Harriet Miers to replace Justice O'Connor. The Miers nomination was later withdrawn by the President and four days later he nominated Samuel Alito (whose nomination was confirmed by the Senate).

Altogether, a total of 122 days, or approximately 4 months, elapsed from Justice O'Connor's announcement that she intended to retire to President G.W. Bush's nomination of Samuel Alito.

The Scalia Vacancy

The third vacancy during this period that had more than one nomination prior to the appointment of a new Justice is the vacancy created by the death of Justice Antonin Scalia on February 13, 2016. In contrast to the Powell and O'Connor vacancies discussed above, this is the sole vacancy during this period for which nominations to the Court will have been made by two different Presidents. Specifically, President Obama nominated Merrick Garland on March 16, 2016 (32 days after Justice Scalia's death). The Garland nomination was not acted upon by the Senate during the second session of the 114th Congress and was returned to the President on January 3, 2017.[69] The Garland nomination was pending before the Senate for a total of 293 days, or approximately 10 months, prior to being returned to the President.

On January 31, 2017, President Trump, 11 days after he assumed office on January 20, 2017, announced his intention to nominate Neil Gorsuch to fill the vacancy created by the death of Justice Scalia.[70]

Factors Affecting the Speed by Which a Nominee Is Selected

Advance Notice of Vacancy

A President may be well positioned to make a quick announcement when a retiring Justice alerts the President beforehand (thus giving the President lead time, before the vacancy occurs, to consider whom to nominate as a successor).[71] Even when receiving no advance warning from an

[69] Senator Mitch McConnell, the Republican Majority Leader, stated, on February 13, 2016, that "the American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President." Consequently, the Senate did not act on the Garland nomination. See Senator McConnell, "Justice Antonin Scalia," *Press Release*, February 13, 2016. In contrast, Senator Harry Reid argued that, the decision not to consider President Obama's nominee amounted to a "full-blown effort to delegitimize President Barack Obama, the presidency, and undermine our basic system of checks and balances." See Alan Fram, Associated Press, "The Senate's top Democrat says Republicans are trying to delegitimize Barack Obama's presidency by trying to prevent him from filling the Supreme Court vacancy," *U.S. News & World Report*, February 22, 2016.

[70] The Associated Press, "Trump Taps Conservative Judge Neil Gorsuch for Supreme Court," *The New York Times*, January 31, 2017, available online at https://www.nytimes.com/aponline/2017/01/31/us/politics/ap-us-trump-supreme-court.html.

[71] Alternatively, as in the case of President Trump's nomination of Neil Gorsuch, the vacancy existed for a period of time prior to an individual being elected President—thus, giving a potential President lead time in terms of whom to

outgoing Justice, the President may already have in hand a "short list," prepared precisely for the event of a Court vacancy, of persons already evaluated and acceptable to the President for the appointment.[72]

Strong Preference of President

If the President has a strong personal preference for a particular individual,[73] nominating the person quickly preempts the issue of whether someone else should be nominated. Rather than focus on a range of individuals who should be considered for the Supreme Court, the appointment process moves to the next major stage, to the question of whether that individual should be confirmed.

Sense of Urgency

Presidents also might be moved to nominate quickly in order to minimize the time during which there is a vacancy on the Court. If an actual vacancy is suddenly created—for example, due to an unexpected retirement, resignation, or death of a Justice—a President, as well as Members of the Senate, might be eager to bring the Court back to full strength as soon as possible. A similar sense of urgency might be felt if a Justice has announced the intention to step down from the Court by a date certain in the near future.

When Vacancy Occurs

The speed with which a President chooses a nominee also, as noted above, can be affected by when a seat on the Court is vacated. Sometimes, Justices might announce their retirement when the Court recesses for the summer, in late June or early July, giving the President little or no advance notice. In such situations, a President might decide to nominate quickly, to allow the Senate confirmation process to begin as quickly as possible. A swiftly made nomination, in such a circumstance, affords the Senate Judiciary Committee and the Senate as long as three months (July through September) in which to consider the nomination before the start of the Court's term in early October, thereby increasing the chances of the Court being at full nine-member strength when it reconvenes.

Sometimes, when Justices give advance notice of their intention to retire, Presidents might be under relatively little pressure to nominate quickly. In the spring of 1993, for example, Justice Byron R. White announced he would step down when the Court adjourned for the summer. His advance notice gave President Clinton and the Senate together more than six months in which, respectively, to nominate and confirm a successor before the beginning of the Court's next term in October. A year later, in the spring of 1994, Justice Harry A. Blackmun announced his intention

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consider for a vacancy on the Court.

[72] According to one account, for example, the selection process for a possible vacancy occurring during the Obama presidency "got its start in the weeks after Mr. Obama's election [in 2008] when he gathered advisers in a conference room in downtown Chicago one day. The court was on his mind. 'Just because we don't have a vacancy right now doesn't mean we shouldn't work on it,' he told the group, according to participants. 'The day we get a vacancy, we want to have a short list of people ready.'" Peter Baker and Adam Nagourney, "Sotomayor Pick a Product of Lessons From Past Battles," *The New York Times*, May 28, 2009, online at http://www.nytimes.com/2009/05/28/us/politics/28select.html?pagewanted=all&_r=0.

[73] For example, following Justice Souter's retirement announcement, President Obama "from the beginning...had been focused on Judge [Sonia] Sotomayor, a federal appeals court judge from New York. She had a compelling life story, Ivy League credentials and a track record on the bench....And by the time the [appointment] opportunity arrived, it became her nomination to lose." Ibid.

to retire at the end of the Court term then in progress, again affording the President and the Senate ample time to appoint a successor to a retiring Justice before the start of the next Court term.[74] Despite the long lead time afforded by Justice Blackmun's announcement, however, White House advisers reportedly believed it was "important to act quickly" to name a successor to Blackmun. To move quickly, it was reported, would serve to "avoid a repeat of the [previous] year's drawn out process" in which President Clinton engaged in a "very public, three-month search" before nominating Ruth Bader Ginsburg to the Court.[75] After Justice Blackmun's announcement, President Clinton deliberated five weeks before announcing, on May 13, 1994, his selection of U.S. appellate court judge Stephen G. Breyer to be his Supreme Court nominee.

President Barack Obama also was provided considerable advance notice of an upcoming Court vacancy when Justice David H. Souter informed the President by letter on May 1, 2009, of his intention to step down when the Court recessed for the summer (the Court went into summer recess on June 29). Three and a half weeks later, on May 26, President Obama announced his intention to nominate a U.S. appellate judge, Sonia Sotomayor, to succeed Justice Souter. The selection by President Obama was, on the one hand, not as quickly made as some of the nominee selections of Presidents Reagan, George H. W. Bush, and George W. Bush. On the other hand, President Obama took less time than President Clinton did in making his three Court selections.

During the 25 days between Justice Souter's retirement notice and the selection of Judge Sotomayor, President Obama had enough time, in his words, to seek "the advice of Members of Congress on both sides of the aisle, including every member of the Senate Judiciary Committee."[76] That he did not take additional time to decide whom to select might have been influenced by a concern for allowing the Senate to begin considering a Court nomination as soon as possible. The President and some Senate Democrats expressed the hope that the Senate would vote to confirm Judge Sotomayor not merely before the start of the Court's term in October, but before the Senate's August 2009 recess, in order to afford time for her to prepare for that term.[77] (The Senate ultimately confirmed the Sotomayor nomination on August 6, 2009.[78])

Presidents also may have considerable latitude in deciding when to nominate if an outgoing Justice schedules his or her retirement to take effect only when a successor is confirmed or assumes office. The most recent instance of that occurred when Justice Sandra Day O'Connor, in a July 1, 2005, letter to President George W. Bush, announced her decision to retire from the

[74] Justice Blackmun reportedly had given even more advance notice to the President, having privately informed him, on or about January 1, 1994, of his intention to retire before the start of the next Court term in October 1994. See Douglas Jehl, "Mitchell Viewed as Top Candidate for High Court," *The New York Times*, April 7, 1994, p. A1; Tony Mauro, "How Blackmun Hid Retirement Plans," *New Jersey Law Journal*, April 25, 1994, p. 18, at http://www.nexis.com. Later, on the eve of his public retirement announcement, on April 6, 1994, Justice Blackmun was reported to have told friends "he wanted to make sure there would be ample time for a successor to be confirmed by the Senate and prepare for the start of a new term in October." Ruth Marcus, "Blackmun Set To Leave High Court," *The Washington Post*, April 6, 1994, p. A1.

[75] Ibid. (Marcus), pp. A1, A7.

[76] U.S. President (Obama, Barack H.), "Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice," *Daily Compilation of Presidential Documents*, May 26, 2009, DCPD-200900402, p. 1.

[77] See CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus (under heading "Activity During 2009").

[78] A year later, President Obama was provided even more advance notice of an upcoming Court vacancy when Justice John Paul Stevens, in an April 9, 2010, letter, informed the President of his intention to step down when the Court recessed for the summer. President Obama announced his selection of a nominee to succeed Justice Stevens, Elena Kagan, on May 10, 2010, taking 31 days to make and announce his selection (compared with the 25 days taken the year before to make and announce his selection of Sonia Sotomayor to succeed outgoing Justice Souter).

Court "effective upon the nomination and confirmation" of her successor.[79] At the announcement of Justice O'Connor's retirement, President Bush declared he would "choose a nominee in a timely manner" so that the nominee would receive a Senate hearing and confirmation vote "before the new Supreme Court term begins."[80] Within three weeks he announced his selection of John G. Roberts Jr. to succeed Justice O'Connor.[81] The conditional nature of Justice O'Connor's planned retirement, however, meant that her seat on the Court would be occupied when the Court convened for its October 2005 term, whether or not her successor were confirmed by then.

Ultimately, Justice O'Connor remained on the Court for four months of the new Court term, retiring only on January 31, 2006, when the third person nominated by President Bush to succeed her, Samuel A. Alito Jr., was confirmed by the Senate. During the months that Justice O'Connor remained on the Court, awaiting the confirmation of her successor, the Associate Justice nomination of John G. Roberts Jr. was withdrawn so that President Bush could nominate Roberts to be Chief Justice (following the death of Chief Justice Rehnquist on September 3, 2005); a second nomination to succeed Justice O'Connor, that of White House Counsel Harriet E. Miers, was made, only to be withdrawn three weeks later; and, on November 10, 2005, a third person, Samuel A. Alito Jr., was nominated to succeed Justice O'Connor. For a President, the need to select an Associate Justice nominee might be seen as less urgent than the appointment of a Chief Justice, particularly if, as was the case in 2005, the Chief Justice position is actually vacant and the Associate Justice vacancy is not actual, but prospective.

Potential Drawbacks of Quickly Selecting a Nominee

Selecting a Supreme Court nominee relatively quickly, however, may sometimes have drawbacks. A President may be accused of charging ahead with a nominee without having first adequately consulted with the Senate, or without having taken the time necessary to determine who really would make the best nominee—either in terms of the nominee's professional qualifications or ideological disposition.[82] Also, quick announcements might not allow time for the FBI to conduct a comprehensive background investigation prior to nomination, leaving open the possibility of unfavorable information about the nominee coming to light later.[83]

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[79] Sandra Day O'Connor, letter to President George W. Bush, July 1, 2005, available at http://www.supremecourtus.gov/publicinfo/press/pr_07-01-05.html.

[80] U.S. President (Bush, George W.), "Resignation of Justice Sandra Day O'Connor from the Supreme Court of the United States," Weekly Compilation of Presidential Documents, vol. 41, July 4, 2005, p. 1108.

[81] While President Bush announced his selection of Roberts to be an Associate Justice nominee on July 19, 2005, he formally transmitted his nomination of Roberts to the Senate 10 days later.

[82] President G.W. Bush, for example, faced criticism for his selection of Harriet Miers to fill the vacancy created by Justice O'Connor's retirement. Prior to Ms. Miers's request that her nomination be withdrawn, there had been "increasingly heated debate over the depth of her conservative beliefs and her qualifications," and her nomination "had been severely criticized by senators of all political stripes—by conservatives who doubted her commitment to their cause, especially her feelings about abortion, and by moderates and liberals, who said they knew too little about her, especially since she had never been a judge." David Stout and Timothy Williams, "Miers Ends Supreme Court Bid After Failing to Win Support," *The New York Times*, October 27, 2005, online at http://www.nytimes.com/2005/10/27/politics/politicsspecial1/27cnd-scotus.html?pagewanted=all&_r=0.

[83] It is "precisely when presidents fail to require thorough checks," two scholars have written, "that trouble is likely." As illustrative, they cite the FBI investigation of President Richard M. Nixon's Supreme Court nominee Clement F. Haynsworth Jr. in 1969. "Unfortunately for both Haynsworth and the president, the cursory FBI check left unrevealed questions of financial dealings and conflicts of interest that would eventually doom the nomination. Without learning from the first mistake, the Nixon Administration rushed headlong into another hurried selection, Harrold Carswell, without full knowledge of flaws that would prove fatal in his background. A similar failure occurred as the Reagan Administration rushed to bring forth a nominee in the wake of the Bork defeat. In this instance, the rushed investigation

Some nominees who were selected relatively quickly by a President were ultimately not approved or considered by the Senate (for one or more of the reasons mentioned above). President Reagan, for example, announced his intention to nominate Robert Bork five days after Justice Powell announced his retirement. Six days after the Bork nomination failed in the Senate, President Reagan subsequently announced his intention to nominate Douglas H. Ginsburg (who later asked the President to withdraw his name from consideration for Powell's seat). But note, however, that the relatively quick selection of a nominee by a President does not necessarily mean that the nomination will not be approved by the Senate. David Souter, for example, was nominated three days after Justice Brennan's retirement was publicly announced (and Clarence Thomas was nominated four days after Justice Marshall's retirement).

Recess Appointments to the Court

On 12 occasions (most of them in the 19th century), Presidents have made temporary appointments to the Supreme Court without submitting nominations to the Senate. These occurred when Presidents exercised their power under the Constitution to make "recess appointments" when the Senate was not in session.[84] Historically, when recesses between sessions of the Senate were much longer than they are today, recess appointments served the purpose of averting long vacancies on the Court when the Senate was unavailable to confirm a President's appointees. The terms of these recess appointments, however, were limited, expiring at the end of the next session of Congress (unlike the potentially lifetime appointments Court appointees receive when nominated and then confirmed by the Senate). Despite the temporary nature of these appointments, every person appointed during a recess of the Senate, except one, ultimately received a later appointment to the Court after being nominated by the President and confirmed by the Senate.[85]

Recess appointments, when they do occur, may cause controversy, in large part because they bypass the Senate and its "advice and consent" role.[86] The last President to make a recess appointment to the Court was Dwight D. Eisenhower. Of the five persons whom he nominated to the Court, three initially received recess appointments and served as Justices before being confirmed by the Senate—Earl Warren (as Chief Justice) in 1953, William Brennan in 1956, and Potter Stewart in 1958.[87]

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failed to uncover the marijuana episodes of Douglas Ginsburg, which led to another presidential setback in the appointment process." Watson and Stookey, *Shaping America*, p. 82.

[84] Specifically, Article II, Section 2, Clause 3 of the U.S. Constitution empowers the President "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."

[85] For a list and discussion of the 12 recess appointments to the Court, see Henry B. Hogue, "The Law: Recess Appointments to Article III Courts," *Presidential Studies Quarterly*, vol. 34, September 2004, pp. 656-673. For more information on judicial recess appointments, CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher (out of print, available to congressional clients from author upon request).

[86] There was, for example, some opposition to the use of a recess appointment to seat Earl Warren as Chief Justice: "Certain segments of the legal community felt strongly that the timing of [Warren's] appointment, with Congress in recess, was entirely inappropriate. These segments felt that the Constitution did not contemplate the seating of any federal judge (especially the Chief Justice of the United States) in advance of Senate confirmation. To be of another opinion would surely result in the subjection of the nominee's interim behavior to floor debates and committee scrutiny that, in turn, would jeopardize his independence of action." John P. Frank and Julie Zatz, "The Appointment of Earl Warren as Chief Justice of the United States," *Arizona State Law Journal*, vol. 23, p. 731 (Fall 1991).

[87] Following their recess appointments to the Court, Justices Warren and Brennan were later confirmed by the Senate by voice vote (thus, there were no recorded "nays" in opposition to either nomination). Justice Stewart, however,

Senate Resolution 334, 86th Congress

The Senate, on August 29, 1960, adopted S. Res. 334 "expressing the sense of the Senate that the President should not make recess appointments to the Supreme Court, except to prevent or end a breakdown in the administration of the Court's business, and a recess appointee should not take his seat on the Court until the Senate has 'advised and consented' to the nomination."[88] The resolution was adopted by a vote of 48-37, largely along party lines.[89]

Senate proponents of the resolution contended, among other things, that judicial independence would be affected if Supreme Court recess appointees, during the probationary period of their appointment, took positions to please the President (in order not to have the President withdraw their nominations) or to please the Senate (in order to gain confirmation of their nominations). It also was argued that Senate investigation of nominations of these recess appointees was made difficult by the oath preventing sitting Justices from testifying about matters pending before the Court.[90]

Opponents, however, said, among other things, that the resolution was an attempt to restrict the President's constitutional recess appointment powers. Opponents also argued that recess appointments were sometimes called for in order to keep the Court at full strength to handle the Court's large and complex case load, as well as to prevent evenly split rulings by its members.[91] Additionally, opponents argued that the resolution "not only went beyond the 'advise and consent' powers of Congress, but that it was a reflection against [Eisenhower], as well as Chief Justice Earl Warren, and Justices William J. Brennan Jr. and Potter Stewart, who were recess appointees during the Eisenhower Administration."[92]

Because of the criticisms of judicial recess appointments in recent decades, the long passage of time since the last Supreme Court recess appointment in 1958, and the relatively short duration of contemporary Senate recesses (which might diminish the need for recess appointments to the Court), a President in the 21st century might hesitate to make a recess appointment to the Court and do so only under unusual circumstances.[93] Additionally, recent Supreme Court jurisprudence

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received 17 nay votes at the time of his confirmation in 1959 (following his recess appointment in 1958). According to one source, "all Senators who voted against the confirmation were Southern Democrats....Southern opposition did not center on Stewart directly but concentrated on such Southern concerns as the [1954] segregation decision and states' rights, plus a belief that making recess appointments to important office lessened the Senate's power to 'advise and consent.'" "1959 Presidential Nominations," *1959 CQ Almanac* (Washington, DC: CQ Press, 1959), p. 664.

[88] "Supreme Court Appointments," *Congressional Quarterly*, September 2, 1960, p. 1520 (hereinafter cited as "Supreme Court Appointments").

[89] Of Democratic Senators voting, 48 of 52 supported the resolution, while all 33 Republican Senators voting were opposed. "Senate Adopts Foreign Aid, Medical Care Conference Reports; Increases Aid Amount on Supplemental; Adopts Court Resolution," *Congressional Quarterly*, September 2, 1960, p. 1540.

[90] Senator Philip A. Hart of Michigan, for example, argued that the Senate was "dreadfully handicapped" in considering nominations to the Court that were the result of recess appointments. "Supreme Court Appointments," p. 1520.

[91] "Opposition to Recess Appointments to the Supreme Court," debate in Senate on S.Res. 334, *Congressional Record*, vol. 106, August 29, 1960, pp. 18130-18145. See also CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher, pp. 16-18 (out of print, available to congressional clients from author upon request).

[92] "Supreme Court Appointments," p. 1520.

[93] A notable, relatively recent instance in which the possibility of a recess appointment to the Court was raised occurred on July 28, 1987, when Senate Minority Leader Robert Dole (R-KS) observed that President Reagan had the constitutional prerogative to recess appoint U.S. appellate court judge Robert H. Bork to the Court. Earlier that month Judge Bork had been nominated to the Court, and, at the time of Senator Dole's statement, the chair of Senate Judiciary Committee, Sen. Joseph R. Biden Jr. (D-DE), had scheduled confirmation hearings to begin on September 15. With various Republican Senators accusing Senate Democrats of delaying the Bork hearings, Senator Dole offered as "food

involving the Recess Appointments Clause might, under certain circumstances, constitutionally limit a President's ability to make recess appointments to the Court.

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for thought" the possibility of President Reagan making a recess appointment of Judge Bork during Congress's August recess. Michael Fumento, "Reagan Has Power To Seat Bork While Senate Stalls: Dole," *The Washington Times*, July 28, 1987, p. A3; also, Edward Walsh, "Reagan's Power To Make Recess Appointment Is Noted," *The Washington Post*, July 28, 1987, p. A8. Judge Bork, however, did not receive a recess appointment and, as a Supreme Court nominee, was rejected by the Senate in a 58-42 vote on October 23, 1987.