The Politics of Supreme Court Nominations
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A Supreme Court Vacancy

(April 2017 Update)

With the death of U.S. Supreme Court Justice Antonin Scalia in February 2016, the nation’s highest court is in need of a new member. Per the Constitution, this process calls for a nomination from the president, followed by a review and vote from the Senate. Justices are appointed for life, and on average, spend decades making decisions on matters of great concern to the country. The Supreme Court weighs in on such issues as immigration, health care, same-sex marriage, gun control, climate change, abortion, unions, among other contentious issues.

The Court now has eight justices, four conservative and four liberal, making the next appointment critical in creating a majority stance. Until a new justice is seated, cases may end in a tie vote. In these instances, the justices can either call for a re-argument of the case at a later date, or allow the ruling of the lower court that last heard the case to serve as the final decision. Supreme Court decisions are extremely influential because they create guidelines followed by all other courts in the nation, and set precedents for future Supreme Court decisions as well.

Because of the stakes involved, the vacancy created by Scalia’s death has led to a contentious exchange in the U.S. Senate. In anticipation of the 2016 election, Republican senators refused to hold nomination hearings for President Obama’s Supreme Court nominee. This tactic led to a successful blocking of Obama’s nominee, leaving the new president the opportunity to name his own nominee. President Trump has nominated Neil Gorsuch, who appeared before the Senate for hearings in March 2017. The Senate is scheduled to vote on the nomination in the first week in April.
What does the U.S. Supreme Court do?

The U.S. Supreme Court performs several functions:

1) Tries cases between two or more states or involving ambassadors and other public ministers

2) Hears appeal cases from lower courts that pertain to constitutional or federal law

3) Reviews executive and legislative acts, with the power to declare these acts unconstitutional (though this power was not granted in the Constitution, but developed by the Court itself in the early nineteenth century. It extends to striking down state laws that are unconstitutional).

The U.S. Supreme Court is the judicial branch of the three-branch federal government: judicial, executive, and legislative. The basis for the U.S. Supreme Court and other federal courts is established in Article III of the Constitution, which also gives Congress authority to choose how to organize the federal court system. The Judiciary Act of 1789 established the Supreme Court with six justices and a lower federal court system. The number of justices fluctuated for decades, settling at nine in the late nineteenth century. Though Congress organized the U.S. Supreme Court, the Court exists as an independent entity whose decisions are not to be influenced by the other two branches (which is why Supreme Court justices are appointed for life, and cannot be removed by the president or a member of Congress because of a difference in political opinion).
Appointing a Supreme Court Justice

The Case of Sandra Day O’Connor

Overview of the Judicial Appointment Process

When an opening occurs for a judicial position (either through retirement, removal, or death), the President nominates someone to fill the position.

The President will try to find a nominee that matches their philosophy but will also take into account the opinion of experts and key Senators.

Once a nominee is selected, his or her name is sent to the Senate Judiciary Committee.

The Judiciary Committee collects information about the nominee, including a background check by the FBI, and reviews the nominee’s record and qualifications.

The Judiciary Committee holds a hearing on the nominee. Witnesses speak both in favor and against the nomination. Senators ask questions of the nominee.

The Judiciary Committee votes on the nomination, and depending on the vote, will either recommend that the Senate vote to approve or reject the nomination.

The full Senate debates the nomination.

A vote of 3/5 of the Senate (60 senators) is required to end debate. This is called a cloture vote. If enough senators wish to delay a vote on a nominee, they can filibuster by not voting to end debate.

When debate ends, the Senate votes on the nomination. Confirmation requires a simple majority of the senators present and voting.

If approved, the President commissions the Justice and they begin their term on the bench.


Courtesy of the Annenberg Presidential Learning Center at the Ronald Reagan Presidential Foundation & Library
A Contentious Process

Read this secondary source to answer the provided questions, in pairs or as an entire class.

In 1987 Republican President Ronald Reagan and a Democratic-controlled Congress took on the task of appointing a new justice to the Supreme Court to replace the seat vacated by retiring Lewis F. Powell, Jr.. Reagan and others anticipated that a new justice would provide the “swing” vote that would move the court to the political right. The president had already successfully nominated Sandra Day O’Connor and Antonin Scalia to the Court, and now hoped to seat Robert Bork, a federal judge and conservative legal theorist, who Reagan praised for being “widely regarded as the most prominent and intellectually powerful advocate of judicial restraint.” Reagan elaborated, explaining that Bork shared “my view that judges' personal preferences and values should not be part of their Constitutional interpretations.”

Bork’s detractors in the Senate Judiciary Committee and elsewhere, pointed to his record that included opposing three issues: an early civil rights law that required businesses to serve non-whites, abortion rights, and the court’s involvement in promoting gender equality. Bork’s staunchly conservative record brought protest from groups that had fought for civil rights advances for African-Americans and women. Democratic senators (including Senate Judiciary Chairman Joe Biden) grilled him on his conservative positions during the televised nomination hearings, in an effort to point out where they felt he was out of step with popular opinion. The hearing was so contentious that Bork’s last name became a new verb, listed in the dictionary as obstructing someone through systematic defamation or vilification.

Judicial restraint is a practice that is most common among conservative judges who believe that the court is not the place to practice political activism and shape policy. These justices tend to honor previous court decisions and laws created by legislators and the president unless they perceive a clear conflict with the Constitution. This stands in contrast to judicial activism that has both a neutral and political definition. Judicial activism can simply describe judges who are more willing to strike down legislation or overturn an earlier court precedent. But the term is also used to (usually negatively) describe a judge who brings personal beliefs to bear in the decision making process, in a sense, “legislating from the bench.”
Democrats uniformly voted against Bork’s confirmation, while six Republicans also rejected the nomination. One of these Republicans was John Warner from Virginia who argued of Bork: “I searched the record. I looked at this distinguished jurist, and I cannot find in him the record of compassion, of sensitivity and understanding of the pleas of the people to enable him to sit on the highest Court of the land.” Indeed, during the hearings Bork called the Brown v. Board school desegregation decision as equally as controversial as the Roe v. Wade decision on abortion. In doing so, Bork appeared to be out of touch with the general consensus that the landmark desegregation ruling was morally correct.

Reagan’s chief of staff next solicited feedback from Senate leaders on the president’s list of 13 potential nominees. Reagan’s second nomination went nowhere, as the nominee withdrew his candidacy after disclosing that he had on more than one occasion used marijuana. Reagan then nominated Anthony Kennedy, a judge with a reputation for being moderately conservative and careful in his deliberations. Kennedy had been one of the potential candidates that Democratic Senate leaders found acceptable, though some Republican Senate leaders viewed Kennedy as not sufficiently conservative. News articles at the time called Kennedy a consensus nominee, and evidence of Reagan yielding to the Democrat’s control of the Senate and his own diminished influence as he entered his final year as president. The Senate confirmed Kennedy’s appointment in February 1988 by a unanimous vote.

Discussion questions:

1) What did Democrats not like about Robert Bork’s nomination?

2) If Bork had been seated, what had Reagan hoped the justice would be able to do on the Court?

3) Why do you think Democrats were more accepting of Kennedy’s nomination, and why do you think Republicans were disappointed?

4) How would you describe the difference between Bork and Kennedy? Why do you think Reagan nominated Kennedy for his third nomination?
Roosevelt’s Judicial Procedures Reform Act, aka “Court-Packing” Plan

Background

The political wrangling over the make-up of the Supreme Court is not just a recent phenomenon. Because the Constitution does not specify from what pool of applicants a justice must be chosen, or what philosophies will guide a justice, it is up to the Senate and presidents to decide these points. It is by definition a political process that can and usually does create political debate among Republicans and Democrats.

When Franklin Roosevelt came into office in 1932 he presided over a country deep in an economic depression. Roosevelt won a large majority of votes over incumbent Herbert Hoover, and FDR believed voters were looking for action to combat the depression. Roosevelt therefore created a great number of agencies aimed to get more Americans working, banks operating soundly, and aid distributed to citizens in need. Not all Americans agreed with Roosevelt’s use of the federal government to regulate a number of aspects of American life. Some opponents (such as businessmen opposed to higher taxes, increased government regulations, and protections for workers) brought cases to the Supreme Court to challenge the constitutionality of several of the New Deal programs.

When the Supreme Court struck down some of Roosevelt’s programs as unconstitutional (including the price-fixing powers of the National Industrial Recovery Act and the Agricultural Adjustment Act that provided government subsidies to farmers), Roosevelt worried that his other New Deal programs might be in jeopardy as well. He therefore sought to alter the makeup of the Supreme Court and lower courts in a way that he believed would be most beneficial to his policies. Roosevelt felt justified, in part, because he won another landslide victory in the 1936 election. Soon thereafter he proposed a judicial reform measure that would allow the president to nominate an additional justice for each sitting justice who did not retire when he reached the age of 70 ½ (of which there were several, some of whom had been voting against New Deal policy). Dubbed “court packing,” Roosevelt’s plan would have allowed six new Supreme Court justices and forty-four lower level judges.

Because the Constitution does not specify the number of justices that would make up the Court, scholars point out that Roosevelt’s plan was not actually unconstitutional. The plan did however create opposition from much of the public, some of his administration, and among the justices who believed he was trying to overreach his executive authority. FDR did not win this battle, as the Senate defeated the measure by a vote of 70-20. Meanwhile, the Court began to uphold more of Roosevelt’s New Deal programs in subsequent hearings.
Soon after the beginning of his second term, President Roosevelt took his case directly to the American people and argued for his plan.

**FDR’s Fireside Chat, March 9, 1937**

*The American people have learned from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing [recovery] - not after long years of debate, but now.*

*The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.*

*Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government - the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.*

*It is the American people themselves who are in the driver’s seat.*

*It is the American people themselves who want the furrow plowed.*

*It is the American people themselves who expect the third horse to pull in unison with the other two...*  

*But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures...*  

*In the last four years the sound rule of giving [legislation] the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.*
“Court-Packing”

Primary Source

A leading national newspaper responded to Roosevelt’s plan with the following editorial.

“The Future of the Supreme Court,” February 7, 1937 from the Chicago Tribune newspaper:

The question raised by [Roosevelt’s] proposal to increase the membership of the Supreme Court to a maximum of fifteen raises the question: Shall the Supreme Court be turned into the personal organ of the President?

That is fundamental because if Congress answers yes, the principle of an impartial and independent judiciary will be lost in this country. In all probability, it will be abandoned for all time. In the past other administrations and other parties in power have been dissatisfied with Supreme Court decisions but have abided by them rather than invite the consequences of a manipulated court. Mr. Roosevelt takes the opposite view. He places his immediate objectives above everything.

Once the president has packed the court to obtain approval of a particular course of action which he favors it is as certain as anything that his successors will find the same or other ways of accomplishing the same end. The court will be manipulated again and again. The will of the people expressed in their Constitution will no longer be the supreme law of the land. Confidence in the integrity of law will be undermined and none of the rights of the citizens will be secure.

The change which Mr. Roosevelt has proposed is revolutionary. The word is used advisedly. The essential difference between free government in America and dictatorial government in Europe is the independence of our three branches of government. Mussolini dominates not only the executive branch of government but the law making and the judicial branches as well. Otherwise he would be no dictator. Precisely the same description applies to Hitler and Stalin. They are dictators because they write the laws, they put them into effect and there is no independent judiciary to which the citizens can appeal against the autocrat.
FDR’s Fireside Chat Discussion Questions:

1) How does Roosevelt describe the functioning of the three branches of government?

2) What does Roosevelt believe the American people want the Supreme Court to do?

3) What evidence does Roosevelt use to support his argument against the Supreme Court’s recent decisions?

4) What does Roosevelt mean when he accuses the Supreme Court of acting like “a policy-making body” in its rulings on the New Deal programs?

5) Would you consider Roosevelt someone who saw the purpose of the Supreme Court to pass rulings based on the Constitution in its original form, or to treat the Constitution as a document able to be interpreted in light of modern developments?

“The Future of the Supreme Court” Discussion Questions:

1) What does this editorial argue will happen to the Supreme Court if Roosevelt succeeds in his judicial reform?

2) What does the author believe will happen to the will of the American people if Roosevelt succeeds?

3) How does the author characterize the difference between America and some European countries, and what is at stake for the American government, according to the author, if Roosevelt succeeds?

4) Given Roosevelt’s fireside chat and this editorial, how do you characterize the disagreement between Roosevelt and people who opposed judicial reform? How do both sides use the Constitution to argue its point?
What does the Constitution Say?

Primary Source

While reading this sentence from Article II, Section 2 of the Constitution of the United States, underline the verbs that refer to the powers granted to the president. Circle the powers of the Senate. Record your observations in the chart below.

**Article II, Section 2**

*The President “shall nominate, and by and with the advice of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for...”*

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What is the difference between nominate, give advice, and appoint?

If you were a Senator, what would you argue is the proper course of action with regard to the 2016 Supreme Court nomination? Why?
While reading this sentence from Article II, Section 2 of the *Constitution of the United States*, underline the verbs that refer to the powers granted to the president. Circle the powers of the Senate. Complete the chart below.

**Article II, Section 2**

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What is the difference between nominate, give advice, and appoint?

If you were a Senator, what would you argue is the proper course of action with regard to the 2016 Supreme Court nomination? Why?
The Ideal Judicial Candidate?

Primary Source

What do presidents consider when they nominate a Supreme Court justice?

The following primary source is a memo to President Ronald Reagan from Roger Clegg, who worked at the U.S. Justice Department as the Assistant to the Solicitor General. The full source can be found at the Annenberg Presidential Learning Center of the Ronald Reagan Presidential Foundation & Library.

The Ideal candidate for this President to nominate to the Supreme Court would be:
1. Conservative;
2. Intelligent;
3. Likely to exercise strong leadership on the Court;
4. Have predictable, well-formed views;
5. Easily confirmable;
6. A politically popular choice;
7. A good speaker and leader outside the Court;
8. Young and in good health;
9. Unlikely to cult; and
10. A good administrator (especially for Chief Justice).

For the remainder of this memorandum, I will describe in greater detail these characteristics.

I. CONSERVATIVE

The first characteristic is the most important but also the hardest to define. In particular, a decision will have to be made at the outset whether, by “conservative,” we mean those who embrace all judicial activism, or those who eschew all judicial activism, or whether either approach is acceptable. If we include conservative activists, then there is the additional question of what a conservative activist is: someone who favors libertarian principles? who favors the government in most cases? who is a member of the Chicago school? who shares the New Right’s social agenda?

- 2 -

Of course, the only intellectually honest thing to do is to require that our candidate renounce judicial activism, period, no matter how laudable the ends sought.

II. INTELLIGENT

This quality overlaps with several others, but deserves separate mention. Without intelligence, a justice is necessarily less predictable (he can be lead astray), less likely to provide effective leadership, and harder to confirm. Most important, however, he is less likely to write good opinions and form the law the way it should be, the sine qua non of a great justice.

III. LEADERSHIP ON THE COURT

Voting the right way is not enough. The ideal justice must convince other justices to vote the right way, too, and he must work with them to build majorities and insert the best language possible in opinions. To do this he must be intelligent enough to be respected by the other justices; be willing to work harder than he would if he were doing just “his” work; be aggressive but congenial and diplomatic; and have a taste for Court politics and argument. He must know how to co-opt others, and when to compromise himself. Some judicial experience is probably useful for all this.
The Ideal Judicial Candidate

**Memo to President Reagan** Discussion Questions:

1) Which characteristics would seem important to a Republican president (Ronald Reagan), and which characteristics would likely be important to any president looking to nominate a Supreme Court justice?

2) What does the author think about judicial activism? In your opinion, what might it accomplish, and what are its drawbacks?

3) What do you think the author means by “He must know how to co-opt others, and when to compromise himself”?

4) Given what you know after this reading, and about President Obama’s priorities and today’s Congress, what characteristics would you add or delete from this list if you were tasked with identifying someone who the Democrats and Republicans could both support?

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**The “Biden Rule”**?

On the Senate floor on June 25, 1992, Joe Biden (then a Democratic Senator from Delaware and chairman of the Senate Judiciary Committee) made a ninety minute speech in which he outlined his opinion on how President George H.W. Bush should handle a vacancy created on the Supreme Court if a justice retired in the coming months. [NYTimes Video excerpt here](3:10).

Later that day, Senator Strom Thurmond (R-SC) offered a counter argument to Senator Biden’s position and explained his understanding of the appointment process. [Video excerpt here](4:56).

On March 16, 2016, Majority Leader Senator Mitch McConnell (R-Ky) responded to President Obama’s Supreme Court justice nomination. [Video excerpt here](6:17).

On March 3, 2016, an op-ed piece written by Vice-President Joe Biden (D) to clarify the position he had taken in 1992 was published in *The New York Times*. [Article here](www.nytimes.com).

What reasons does each give for his opinion on how to handle nominations in an election year? Which arguments do you find most convincing? How should the current presidential candidates respond to this issue? What do you predict will happen next?
Links

**Contentious Process**

“How Long Does it Take to ...”

“Congress Girds for What it Loves Most...”

“The Sad Legacy of Robert Bork”

“Reagan Nominates Anthony Kennedy...”

“Obama Supreme Court Interviews Adalberto...”

**The “Biden Rule”?**

Biden’s Speech, 1992

Thurmond’s Speech, 1992
http://www.c-span.org/video/?c4585591/senator-strom-thurmond

McConnell’s Speech, 2016

Biden Op-Ed
http://www.nytimes.com/2016/03/04/opinion/joe-biden-the-senates-duty-to-advise-and-consent.html?_r=0

**Franklin D. Roosevelt and “Court-Packing”**

“Court Packing: Judicial Reorganization...”
http://xroads.virginia.edu/~ma02/volpe/newdeal/court.html

“FDR’s Loosing Battle...”
http://xroads.virginia.edu/~ma02/volpe/newdeal/court.html

**Additional information**

See the Annenberg Presidential Learning Center at the Ronald Reagan Presidential Foundation & Library for a lesson on the appointment of Justice Sandra Day O’Connor in 1981. The lesson includes a reading excerpt from the Federalist papers and comprehension questions, as well as additional primary sources and student activities that provide insight into the selection, nomination, and appointment process for a Supreme Court justice.

Visit this U.S. Courts website for more information about the role of federal courts, and for student activities that explore historic Supreme Court cases and hypothetical contemporary cases involving specific constitutional rights.
http://www.uscourts.gov/educational-resources/educational-activities/supreme-court-activity
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Seal of the Supreme Court of the United States of America
Courtesy of the SupremeCourt.gov
http://www.supremecourt.gov/about/about.aspx

Chamber in the U.S. Supreme Court, Washington, D.C.
Courtesy of the Carol Highsmith Collection at the Library of Congress
http://hdl.loc.gov/loc.pnp/highsm.13984

The Justices, January 2016
Courtesy of The Supreme Court Historical Society
http://www.supremecourthistory.org/history-of-the-court/

President Ronald Reagan with Robert Bork 1987
Courtesy of the Ronald Reagan Library

President Reagan meeting with Judge Anthony Kennedy in the oval office, 1987
Courtesy of the Ronald Reagan Library
https://reaganlibrary.archives.gov/archives/photographs/large/C43610-23.jpg

FDR [Franklin Delano Roosevelt] Fireside chat on U.S. Supreme Court Reform Plan, 1937
Courtesy of the Harris & Ewing Collection at the Library of Congress
http://hdl.loc.gov/loc.pnp/hec.47304

Princeton professor criticizes Supreme Court. Washington, D.C., March 17, 1937
Courtesy of the Library of Congress
http://hdl.loc.gov/loc.pnp/hec.22401
About Teach the Election

Teach the Election puts the 2016 Election in its historical context with classroom-ready explanations of the electoral process, relevant issues, and suggestions to incorporate the election cycle into the regular curriculum. Teach the Election also helps students engage with informational text and primary sources to help them make the evidence-based arguments required by California’s Standards.

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