Judges and Justices

Inquire: What Process Does the President Go Through When Deciding Upon a Judicial Nominee?

Overview

Every president wants to leave a legacy — to make a lasting impact — on America. Almost every president has done this through the appointment of justices to the Supreme Court. John Adams, as instrumental as he was as a founding father, only served one term as president before losing to Thomas Jefferson in 1800. However, before leaving office, Adams appointed John Marshall as Chief Justice of the Supreme Court. Marshall’s decisions, quite possibly, created a legacy as large as any president in American history.

How do the presidents decide on who to nominate? What process do these nominees go through? We will answer these questions and more in this lesson as we explore the selection and nomination processes for the Supreme Court.

Big Question: What qualifications does the president look for in a nominee to the Supreme Court?

Watch: Even with All the Vetting…

When a president has an opening on the Supreme Court, he or she knows that the nomination and a successful appointment is a chance to leave a legacy.

It is important, then, that anyone the president nominates is fully prepared for the Senate confirmation hearings. Members of the president’s party will be tough, but the opposing party will be nothing short of brutal.

It is essential that every potential bad thing has been uncovered, discussed, and prepared for, because the opposing party will leave no stone unturned in their efforts to attack and embarrass the nominee. The vetting becomes detailed, even harsh, as the White House tries to ensure there will be no surprises in the hearings on Capitol Hill. Traffic citations, school pranks, embarrassing pictures when the nominee was younger — all of these things can become fair game in the Senate confirmation hearings. Nominees have been rejected because of marijuana use in college, their interpretation of the Constitution, and for lack of experience.

The most contentious hearing may have been for Supreme Court nominee Clarence Thomas, an African American jurist nominated by George H.W. Bush in 1991 to replace Thurgood Marshall. Just three days before his final confirmation vote, Anita Hill, an African American law professor who had worked with
Thomas, made allegations of sexual harassment. Three days of acrimonious testimony and hearings followed, with Hill making accusations that Thomas denied and countered with his own attacks. Thomas was finally confirmed, 52 - 48, the closest confirmation vote in the history of the Senate.

Thomas has served on the Court since — one of the longest serving members — but there is no doubt the allegations have always left a cloud over Thomas' tenure on the Court.

Knowing the intensity of the confirmation questioning, it seems impossible that these sorts of potential issues were ignored, left uncovered, or seemed so minor that they would not matter. Still, somehow, someway, these issues were left to be discussed in public at the hearings — which is exactly the kind of situation presidents hope to avoid!

The lesson to be learned? Whether you are in high school or college, now is the time to start planning for a career on the Supreme Court! Before you say yes to any activity, ask yourself, "Will this be a problem in my confirmation hearings?"

Read: The Selection of Judges and Justices - An All-Important Part of the Presidential Legacy

Overview
Judges fulfill a vital role in the U.S. judicial system and are carefully selected. At the federal level, the president nominates a candidate to a judgeship or justice position, and the nominee must be confirmed by a majority vote in the U.S. Senate, a function of the Senate's "advice and consent" role. All judges and justices in the national courts serve lifetime terms of office.

The president sometimes chooses nominees from a list of candidates maintained by the American Bar Association, a national professional organization of lawyers. The president's nominee is then discussed (and sometimes hotly debated) in the Senate Judiciary Committee. After a committee vote, the candidate must be confirmed by a majority vote of the full Senate. If confirmed, he or she is then sworn in, taking an oath of office to uphold the Constitution and the laws of the United States.

When a vacancy occurs in a lower federal court, by custom, the president consults with that state's U.S. senators before making a nomination. Through such senatorial courtesy, senators exert considerable influence on the selection of judges in their state, especially those senators who share a party affiliation with the president. In many cases, a senator can block a proposed nominee just by voicing his or her opposition. Thus, a presidential nominee typically does not get far without the support of the senators from the nominee's home state.

Supreme Court
Most presidential appointments to the federal judiciary go unnoticed by the public, but when a president has the rare opportunity to make a Supreme Court appointment, it draws more attention. That is particularly true now, when many people get their news primarily from the Internet and social media. It was not surprising to see not only television news coverage but also blogs and tweets about President Obama's most recent nominees to the high court, Sonia Sotomayor and Elena Kagan.

President Obama made two appointments to the U.S. Supreme Court, Justices Sonia Sotomayor in 2009 and Elena Kagan in 2010. Since their appointments, both justices have made rulings consistent with a more liberal ideology. The death of Justice Antonin Scalia in February 2016 prompted discussion of
appointing a new justice, and Obama nominated Merrick Garland to fill the vacant seat. However, Republicans had a majority in the Senate, and the Senate leadership simply refused to hold hearings until after the 2016 presidential election. They were gambling that Republicans would hold their majority in the Senate and that the Republican nominee would win the presidency. Their gamble paid off, as Donald Trump won the presidency and nominated conservative jurist, Neil Gorsuch, who was confirmed in April 2017.

Presidential nominees for the courts typically reflect the chief executive’s own ideological position. With a confirmed nominee serving a lifetime appointment, a president’s ideological legacy has the potential to live on long after the end of his or her term.

Supreme Court appointees, and both Sotomayor and Kagan have consistently ruled in a more liberal ideological direction. The timing of the two nominations benefited when the Democratic Party gained control of the Senate in the 111th Congress of 2009–2011. The Democratic majority helped guarantee their confirmations.

But, some justices turn out to be surprises or end up ruling in ways that the president who nominated them did not anticipate. Democratic appointed judges sometimes side with conservatives, just as Republican appointed judges sometimes side with liberals. Republican Dwight D. Eisenhower reportedly called his nomination of Earl Warren as chief justice — in an era that saw substantial broadening of civil and criminal rights — “the biggest damn fool mistake” he had ever made. Sandra Day O’Connor, nominated by Republican president Ronald Reagan, often became a champion for women’s rights. David Souter, nominated by Republican George H. W. Bush, more often than not sided with the Court’s liberal wing. And even on the present-day court, Anthony Kennedy, a Reagan appointee, has become notorious as the Court’s swing vote, sometimes siding with the more conservative justices but sometimes not. Current chief justice John Roberts, though most typically an ardent member of the Court’s more conservative wing, has twice voted to uphold provisions of the Affordable Care Act.

Once a justice has started his or her lifetime tenure on the Court and years begin to pass, many people simply forget which president nominated him or her. For better or worse, sometimes it is only a controversial nominee who leaves a president’s legacy behind. For example, the Reagan presidency is often remembered for two controversial nominees to the Supreme Court — Robert Bork and Douglas Ginsburg. Bork was accused of taking an overly conservative and extremist view of the Constitution, and Ginsburg was accused of having used marijuana while a student and then a professor at Harvard University. President George W. Bush’s nomination of Harriet Miers was withdrawn in the face of criticism from both sides of the political spectrum. Republicans and Democrats questioned her ideological leanings and especially her qualifications, suggesting she was not ready for the job.

After Miers’ withdrawal, the Senate went on to confirm Bush’s subsequent nomination of Samuel Alito, who remains on the Court today. The 2016 presidential election was especially important because President Trump will likely to choose three justices.

Reflect: Do You Have What it Takes to be A Supreme Court Justice?

Poll
In your personal opinion, would being a Supreme Court justice be worth having everything you have ever done being revealed to the public?
Expand: The “Short List”

Discover

Legendary Justice Oliver Wendell Holmes once said that a Supreme Court justice should be a "combination of Justinian, Jesus Christ, and John Marshall."

Why are venerable former justices sources of guidance in understanding necessary qualities for federal judges?

The Constitution is silent on judicial qualifications. It meticulously outlines qualifications for the House of Representatives, the Senate, and the presidency, but it does not give any advice for judicial appointments other than stating that justices should exhibit "good behavior." As a result, selections are governed primarily by tradition.

Presidents and their staff vet each potential candidate and arrive at “the short list” — the names of those candidates who are essentially the finalists — from which the president will choose his nominee.

The Nomination Process

The Constitution provides broad parameters for the judicial nomination process. It gives the responsibility for nominating federal judges and justices to the president. It also requires nominations to be confirmed by the Senate.

More than 600 judges sit on district courts, almost 200 judges sit on courts of appeals, and nine justices make up the Supreme Court. Because all federal judges have life terms, no single president will make all of these appointments.

That said, many vacancies do occur during a president's term of office. Appointing judges, then, could be a full-time job. A president relies on many sources to recommend appropriate nominees for judicial posts.

Recommendations often come from the Department of Justice, the Federal Bureau of Investigation, members of Congress, sitting judges and justices, and the American Bar Association. Some judicial hopefuls even nominate themselves.

A special, very powerful tradition for recommending district judges is called senatorial courtesy. According to this practice, the senators from the state in which the vacancy occurs actually make the decision. A senator of the same political party as the president sends a nomination to the president, who almost always follows the recommendation. To ignore it would be a great affront to the senator, as well as an invitation for conflict between the president and the Senate.

Selection Criteria

Presidents must consider many factors in making their choices for federal judgeships:

- Experience — Most nominees have had substantial judicial or governmental experience, either on the state or federal level. Many have law degrees or some other form of higher education.
• Political ideology — Presidents usually appoint judges who seem to have a similar political ideology to their own. In other words, a president with a liberal ideology will usually appoint liberals to the courts. Likewise, conservative presidents tend to appoint conservatives.

• Party and personal loyalties — A remarkably high percentage of a president's appointees belong to the president’s political party. Although political favoritism is less common today than it was a few decades ago, presidents still appoint friends and loyal supporters to federal judgeships.

• Ethnicity and gender — Until relatively recently, almost all federal judges were white males. Today, however, ethnicity and gender are important criteria for appointing judges. In 1967, Lyndon Johnson appointed the first African American Supreme Court justice, Thurgood Marshall. In 1981, Ronald Reagan appointed the first woman to the Supreme Court, Sandra Day O'Connor. All recent presidents have appointed African Americans, Latinos, members of other ethnic minority groups, and women to district courts and courts of appeal.

Having gone through all of this, the president and his staff compile “the short list” — three or four names of candidates the president and his staff will vet even further and interview before they finally decide on a nominee.

Because federal judges and Supreme Court justices serve for life, a president's nomination decisions are in many ways his or her most important legacy. Many of these appointments will serve long after a president's term of office ends. Whether or not the results are a "combination of Justinian, Jesus Christ, and John Marshall," these choices can have an impact on generations to come.

Lesson Toolbox

Additional Resources and Readings
Title: How do US Supreme Court justices get appointed? - Peter Paccone
• Description: A video discussing how U.S. Supreme Court justices get appointed
  • https://www.youtube.com/watch?v=0xnzGSV66x4

Title: Why Supreme Court Justices Serve for Life
• Description: A video providing an explanation as to why Supreme Court justices have to serve life-long terms
  • https://www.youtube.com/watch?v=FGfXipClCjU

Title: A look at the current Supreme Court
• Description: A video showing the current Supreme Court justices
  • https://www.youtube.com/watch?v=IMYDrMzwmmM

Lesson Glossary

senatorial courtesy: an unwritten custom by which the president consults the senators in the state before nominating a candidate for a federal vacancy there, particularly for court positions
vet: to thoroughly check or investigate particularly with regard to providing formal approval
Check Your Knowledge

1. Senatorial courtesy is a formal custom by which the president consults the senators in the state before nominating a candidate for a federal vacancy.
   A. True
   B. False

2. Some confirmed nominees could rule in ways that the president who nominated them did not anticipate.
   A. True
   B. False

3. Because all federal judges have life terms, no single president will make all of these appointments.
   A. True
   B. False

Answer Key:

Citations

Lesson Content:
Authored and curated by Jay Reynolds, J.D. for The TEL Library. CC BY NC SA 4.0

Adapted Content:

Title: American Government – 13.3 The Federal Court System – The Selection of Judges: Rice University, OpenStax CNX. License: CC BY 4.0 http://cnx.org/contents/5bcc0e59-7345-421d-8507-a1e4608685e8@16.1