



President's Selection of a Nominee for a Supreme Court Vacancy: Overview

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Analyst in American National Government

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On June 27, 2018, Justice Anthony Kennedy, after serving on the Supreme Court as an Associate Justice since 1988, announced his intention to retire from the U.S. Supreme Court. Justice Kennedy indicated that his retirement would be effective July 31, 2018. Subsequently, on July 9, 2018, President Donald Trump announced his intention to nominate Judge Brett Kavanaugh to fill the impending Kennedy vacancy.

This Insight provides an overview of several issues related to the selection of a nominee by a President for a vacancy on the Court. For additional information and analyses on these and other issues, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*.

The Role of Senate Advice

When a vacancy occurs on the Supreme Court, it becomes the President's constitutional responsibility to select a successor to the vacating Justice, as well as the constitutional responsibility of the Senate to exercise its role in providing "advice and consent" to the President. Constitutional scholars have differed in how much importance the Framers of the Constitution attached to the word "advice" in the phrase "advice and consent." 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. Presidents have also traditionally consulted with a candidate's home state Senators, especially if they are of the same political party as the President.

Criteria for Selecting a Nominee

While the precise criteria used in selecting a Supreme Court nominee vary by 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

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“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. Other criteria might include a nominee’s reputation for integrity and impartiality, demographic considerations, and the personal qualities of the nominee.

Figure 1 shows, from 1975 to the present, the type of professional position or occupation held by an individual at the time of his or her nomination to the U.S. Supreme Court. Since 1975, the most common type of profession at the time of an individual’s nomination has been service as a circuit court judge—15, or 83%, of 18 nominees fall into this category. Note, though, that during the post-war period prior to 1975, i.e., from 1945 through 1974, it was less common for a nominee to have been serving as a circuit court judge at the time of nomination. Of the 20 nominees during this earlier period, 9, or 45%, were serving as a circuit court judge when nominated. See Figure 1 in CRS Report R44235 for additional historical details.

Figure 1. Type of Professional Experience at Time of Nomination
(1975-Present)

Nominating President	Nominee	Year Nominated	Profession at Time of Nomination					
			U.S. Circuit Court Judge	State Judge	Exec. Branch Official	Private Practice	Governor	Senator
Trump	Kavanaugh	2018	●	○	○	○	○	○
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	●	○	○	○	○	○

* Nomination withdrawn by the President or rejected by the Senate.
** President announced intention to nominate but did not formally submit nomination to Senate.

Source: Congressional Research Service

Speed by Which a President Selects a Nominee

When a vacancy occurs on the Court, there is variation in how quickly a President selects a nominee. Factors that might affect the speed by which a nominee is selected include whether a President has advance notice of a Justice’s decision to retire; whether a President has a strong personal preference for a particular individual; and when a vacancy occurs during the calendar year.

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.

Note that the figure only shows those vacancies on the Court since 1975 for which a single nomination was made for the vacancy to be filled. So, for example, the vacancy created in 2016 by the death of Justice Antonin Scalia is not included in **Figure 2** (since, when it was filled, two nominations had been made to fill it). Since 1975, there have been three vacancies on the Court, including the Scalia vacancy, for which more than one nomination was made prior to the vacancy being filled. See pp. 17-18 in CRS Report R44235 for additional information.

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 or two of the vacancy being announced. Most recently, for example, President Trump nominated Brett Kavanaugh 12 days after Justice Kennedy announced his intention to retire from the Court. Previously, Presidents Reagan and George H. W. Bush selected most of their Supreme Court nominees within days of the vacating Justices publicly announcing their retirements from the Court. President George W. Bush also moved 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.

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

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

(Current Vacancy and Vacancies Since 1975 That Had Only One Nomination Prior to Being Filled)

Departing Justice	Nominating President	Nominee	Number of Days Elapsed until Announcement of Intent to Nominate
<i>Current vacancy and nomination</i>			
Kennedy	Trump	Kavanaugh	12
<i>Vacancies since 1975 that required only one nomination prior to being filled</i>			
Stevens	Obama	Kagan	31
Souter	Obama	Sotomayor	25
Rehnquist	Bush, G.W.	Roberts*	2
Blackmun	Clinton	Breyer	37
White	Clinton	Ginsburg	87
Marshall	Bush, G.H.W.	Thomas	4
Brennan	Bush, G.H.W.	Souter	3
Rehnquist**	Reagan	Scalia	0
Burger	Reagan	Rehnquist**	0
Stewart	Reagan	O’Connor	19
Douglas	Ford	Stevens	16

* 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 serve on the Court as Chief Justice.

** 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.

Source: Congressional Research Service

Additionally, two of President Obama's Supreme Court selections were made within approximately one month of a vacancy announcement. He selected Sonia Sotomayor 25 days after Justice David Souter announced he was leaving the Court, and selected Elena Kagan 31 days after Justice John Paul Stevens announced his retirement.

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