



Supreme Court Vacancies That Occurred During Presidential Election Years (1789-2020)

October 1, 2020

The death of Justice Ruth Bader Ginsburg on September 18, 2020, created a vacancy on the Supreme Court during a presidential election year. This is the 14th such vacancy on the Court that has occurred during a presidential election year from 1789 to 2020 and that also occurred *prior to the election date itself*. Information and analysis related to these 14 vacancies are presented below.

The following election-year vacancies on the Supreme Court fall outside the scope of this Insight: (1) four vacancies that arose during presidential election years but occurred *after* the general election date; (2) eight vacancies that arose during the year *prior to* a presidential election year and still existed, for at least some period of time, during the election year itself; (3) two anticipated future vacancies on the Court that occurred in 1968 (i.e., vacancies that did not exist when President Johnson submitted nominations to the Senate); and (4) six initial vacancies on the Court when it was first established by Congress in 1789. Information about these vacancies is available from the author upon request by congressional readers.

For comprehensive analysis of the Supreme Court nomination and confirmation process, see CRS Report R44235 (addressing the selection of a nominee by a President), CRS Report R44236 (addressing the role of the Senate Judiciary Committee in processing nominations), and CRS Report R44234 (addressing Senate debate and final action on nominations).

Some Senators have called for the Ginsburg vacancy to be filled after the inauguration of the winner of the presidential election on November 3, 2020. Other Senators have called on the Senate to consider President Trump's nominee for the vacancy, Judge Amy Coney Barrett, prior to the election. This Insight does not take a position as to when the Senate should confirm a nominee to the Ginsburg vacancy.

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Senate Action on Nominations for Vacancies that Occurred During Presidential Election Years

Nomination Submitted During Election Year

As shown by **Figure 1**, 12 (86%) of 14 vacancies that arose during a presidential election year prior to the election had a nomination submitted to the Senate during that same year. For these 12 vacancies, 7 (58%) had a nominee confirmed during the election year, 4 (33%) did not have a nominee confirmed during the election year, and 1 is the current Ginsburg vacancy. The most recent vacancy that arose during a presidential election year for which a nominee was not confirmed was the vacancy created by the death of Justice Antonin Scalia in 2016 (prior to this, 1852 was the most recent presidential election year during which a nomination was submitted and not confirmed by the Senate).

Of the seven vacancies that arose during presidential election years, and also had a nomination submitted and confirmed that same year, six featured unified party control (i.e., the party of the President was the same as the Senate majority party) and one featured divided party control (i.e., the party of the President was different than the Senate majority party). Of the four presidential election-year vacancies for which nominations were submitted during the election year but not confirmed, each featured divided party control.

No Nomination Submitted During Election Year

Figure 1 also shows that 2 (14%) of 14 vacancies that arose during a presidential election year did not have a nomination submitted until the following calendar year. In one case (the Black nomination), the nomination was rejected by a Senate floor vote. In another case (the Brennan nomination), the nominee was confirmed by the Senate after he received a recess appointment during the preceding presidential election year.

The Black nomination featured unified party control (a Democratic President and Democratic Senate majority) while the Brennan nomination featured divided party control (a Republican President and Democratic Senate majority).

Variation in Number of Days from Vacancy Occurring to Presidential Election Date

Figure 1 shows, for each of the 14 vacancies that arose during a presidential election year, the number of days from the vacancy occurring to the date of that year's presidential election.

For the 14 vacancies, the average number of days a vacancy arose prior to a presidential election was 175 days, or approximately 5.8 months (the median was 177 days).

For the seven vacancies that occurred during a presidential election year and for which a nominee was confirmed the same year, the average number of days from the vacancy occurring to the election date was 227 days, or approximately 7.5 months (the median was 281 days). For the four vacancies that occurred during a presidential election year and for which a nominee was not confirmed the same year, the average number of days from the vacancy occurring to the election date was 159 days, or approximately 5.2 months (the median was 150 days).

The shortest period of time from a vacancy occurring to a presidential election date occurred in 1956, when Justice Sherman Minton assumed senior status on October 15, 1956 (22 days prior to the

presidential election). William Brennan, Jr., received a recess appointment by President Eisenhower on that same date (October 15). The following year, Mr. Brennan was renominated by President Eisenhower and confirmed by the Senate.

The second-shortest period of time occurred in 1864, when Chief Justice Roger Taney died on October 12, 1864 (27 days prior to the presidential election). Salmon Chase was nominated for the Taney vacancy on December 6, 1864, 29 days after the presidential election. Mr. Chase was confirmed on the same day he was nominated.

The third-shortest period of time from a vacancy occurring to a presidential election date is the current vacancy created by the death of Justice Ruth Bader Ginsburg on September 18, 2020 (46 days prior to the presidential election on November 3, 2020).

Figure 1. Supreme Court Vacancies That Occurred Prior to the Election During **Presidential Election Years**

(1789-2020)

= Political party of President different from majority party in Senate		Nominating President running for re-election	Image: Second
Vacancy	Nomination		
Departed Justice (year of departure)	Nominating President	Nominee (year nominated)	Final action on nomination
Moore (1804)	😒 Jefferson	Johnson (1804)	🤣 Confirmed during election yr. (before election)
Trimble (1828)	🖸 Adams, J.Q.	Crittenden (1828)	Consideration of nomination postponed 3
Baldwin (1844)	Tyler ¹	King (1844)	Nomination tabled ³
McKinley (1852)	Fillmore	Bradford (1852)	Nomination tabled ³
Daniel (1860)	Buchanan	Black (1861) ²	😢 Rejected by Senate ³
Taney (1864)	🖸 Lincoln	Chase (1864)	🧭 Confirmed during election yr. (after election)
Waite (1888)	😒 Cleveland	Fuller (1888)	Confirmed during election yr. (before election)
Bradley (1892)	🖸 Harrison	Shiras (1892)	Confirmed during election yr. (before election)
Lamar (1916)	🖸 Wilson	Brandeis (1916)	Confirmed during election yr. (before election)
Hughes (1916)	🖸 Wilson	Clarke (1916)	Confirmed during election yr. (before election)
Holmes (1932)	🖸 Hoover	Cardozo (1932)	Confirmed during election yr. (before election)
Minton (1956)	Eisenhower	Brennan (1957) ²	Received recess appointment ⁴
Scalia (2016)	Obama	Garland (2016)	No action taken by Senate ³
Ginsburg (2020)	🖸 Trump	Barrett (2020)	? To be determined

Number of days from date of vacancy occurring to presidential election date



2. Person was not nominated during presidential election year.

3. Vacancy filled by different President (other than initial nominating President).

4. Brennan was subsequently nominated in 1957 and confirmed by the Senate that same year.

Additional unsuccessful nominations for these vacancies: President Tyler made two other unsuccessful nominations for the Baldwin vacancy. President Polk made one unsuccessful nomination for the Baldwin vacancy. President Fillmore made two other unsuccessful nominations for the McKinley vacancy.

Only actual vacancies on the Court are listed in the figure. Consequently, the anticipated vacancies in 1968 for which President Johnson nominated Abe Fortas to be Chief Justice and Homer Thornberry for Associate Justice are not included in the figure.

Source: Congressional Research Service.

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