The Modern Supreme Court

The Selection Process

The United States' president and Congress each hold a great deal of political power, but their authority is checked by the Supreme Court. The Supreme Court is responsible for interpreting the Constitution and ensuring that subsequent acts and laws conform to the founders' original intent when they created the Constitution. Serving on the Supreme Court is one of the highest honors a person can attain in this country and an achievement that does not come easily.

The modern Supreme Court consists of eight associate justices and one chief justice. Each of these nine members is nominated by the President of the United States and confirmed by the Senate. Although judicial experience is not required to serve as a Supreme Court justice, all of the current justices had extensive experience as attorneys and judges before being nominated to the Supreme Court. In fact, the Constitution makes no reference to qualifications for justices, nor does it impose limits on a justice's tenure, except to state in Article III, Section I that a justice has life tenure to serve the Court "during good behavior."

When a vacancy occurs on the Supreme Court, the president considers his options carefully when nominating a replacement. The process of selecting members of the Court is highly political and controversial and requires compromise between the president, who makes the appointment, and the Senate, who confirms the appointment. If the chief justice's position is vacant, the president can consider the associate justices as suitable replacement candidates or may look outside the Court for a replacement.

For example, the current Chief Justice, William Rehnquist, was an associate justice when President Ronald Reagan nominated him to fill the chief justice spot vacated by Warren Burger. Earl Warren, placed on the Court by Dwight Eisenhower, had been governor of California and a prosecuting attorney but had never served on the court. Several justices in the twentieth century entered the Court after highly successful careers as lawyers who argued before the Court. Louis Brandeis was famous for the "Brandeis Brief," Thurgood Marshall was noted for his successful civil rights litigation concluding in the Brown v. BOE of Topeka case, and Abe Fortas had a distinguished career successfully arguing the Gideon v. Wainwright case.

After the president nominates an associate justice or a chief justice, the individual must go through a senatorial confirmation process before being seated in their new position—even if a chief justice nominee is serving on the Supreme Court. This ensures that the "checks and balances" concept of government applies to the judiciary system and that neither the president nor Congress has too much power in the appointment and confirmation process.

A president will typically look to his own political party to find a suitable nominee, since members of the same party usually share similar ideologies when interpreting the Constitution and taking positions on political issues. Presidents and their advisors may apply the "litmus test" to a potential nominee. Applied to politics, a litmus test is used to choose a candidate based on whether his or her views are liberal or conservative on a single, divisive issue such as women's reproductive rights or gay marriage. Senators, who must vote to approve a nomination, may apply their own litmus tests by reviewing a nominee's previous statements and writings to make an educated guess on how the nominee would
perform if the appointment is confirmed.

Although the president, his staff, and the Senate will analyze a candidate's background, a sitting Supreme Court justice is under no obligation to concur with anyone's viewpoints—even those of the individuals who played major roles in getting him seated on the Supreme Court. Any number of factors can affect a justice’s ruling, including major world events that change the mindsets of the justices and influence public opinion.

Moreover, justices occasionally have to make rulings that disagree with their personal beliefs but that uphold the Constitution. For example, in Texas v. Johnson from 1989, the Supreme Court upheld the First Amendment right of Gregory Johnson to burn the American flag. Their decision did not reflect their personal beliefs on flag-burning, but they were obligated to rule in Johnson's favor based on the First Amendment. Still, a president holds some expectation that the candidate he nominates will reflect his party's beliefs in his or her rulings. Because of this, several justices have disappointed the presidents who appointed them.

Political ideology is not the only reason presidents typically look to their own party first for potential candidates. A president can use federal judgeship appointments to reward partisan backers for their support during the president's campaign. One example of this occurred in 1952, when Earl Warren helped get Dwight Eisenhower elected, so Eisenhower promised Warren that he would receive the first Supreme Court nomination that came available. Warren was named chief justice of the Supreme Court in 1953, although President Eisenhower came to regret the nomination because Warren's liberal actions were not in line with the moderate conservative ideals Eisenhower expected from him.

The president also considers a number of other factors when selecting a justice candidate. Although there is no quota for the demographic makeup of the Supreme Court, there have been many references to the "black seat," "Jewish seat," and "female seat" over the years. These classifications refer to the tendency of presidents to represent certain powerful minority groups on the Supreme Court. Thurgood Marshall was the first African American to take a seat on the Court in 1967. When he left the bench in 1991, he was replaced by another African American, Clarence Thomas, which further reinforced the perception of a "black seat." The concept of a Jewish seat has been less definite. The first Jewish appointee was Louis Brandeis in 1916, but there were gaps of time without a Jewish justice on the Supreme Court in subsequent years.

The first female justice was Sandra Day O'Connor. Ronald Reagan had committed to appointing a woman to the Supreme Court if he was elected to the presidency, and O'Connor reaped the benefit of that promise in 1981. Justice O'Connor retired from the Court in 2006, leaving the Court with one female justice—Justice Ruth Bader Ginsberg. Promises to nominate justices from these minority groups may help a presidential candidate or a president running for re-election gain favor with his supporters and therefore may play a role in determining who is nominated to the Court.