

SUPREME CONSEQUENCES

How a President's Bad Judicial Appointments
Threaten Your Liberty





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THE FEDERAL JUDICIARY: NO LONGER THE "LEAST DANGEROUS BRANCH"

Our Founding Fathers recognized that too much power accumulated in one branch of government is a significant threat to liberty. They sought to avoid this by separating power among the three branches of the federal government and between the federal government and the sovereign states. This system of checks and balances would prompt ambition to counteract ambition. Our constitutional system relies on this separation of powers to limit the ability of any one branch to encroach upon the prerogatives of the other branches, helping preserve our liberty against any monopoly of governmental power.

While the courts have the duty to say what the law is in a case properly before them, the other branches of government have an independent obligation to uphold the Constitution. Although the Framers of the Constitution envisioned that the judiciary would be the “least dangerous branch,” it has transformed itself into a policymaking body that wields wide-ranging power over virtually every aspect of American life. The Supreme Court has grabbed power by declaring that its decisions are the supreme law of the land, and the other branches have largely acceded to these claims.



Judges engage in **judicial activism** when they write subjective policy preferences into the law instead of applying the law impartially according to its original meaning.

Examples of Supreme Court Power Grabs



Usurping national security authority, the Supreme Court extended the right of habeas corpus to the Guantanamo Bay detainees in *Boumediene v. Bush*.



The Supreme Court instituted one of the largest tax increases in history in *National Federation of Independent Business v. Sebelius* when it strained the Affordable Care Act’s text to uphold the individual health care mandate as a valid exercise of Congress’s taxing power.



In *Kelo v. City of New London*, the Supreme Court interpreted the Takings Clause of the Constitution to allow the government to seize citizens’ homes—not to build a road or fulfill some other public use as is required by the Fifth Amendment, but to transfer the property to a private corporation because it could pay more taxes.



In recognizing a constitutional right to marriage that includes same-sex couples in *Obergefell v. Hodges*, the Supreme Court issued a decision so unmoored from the text of the Constitution that even supporters of the ruling have described it as unintelligible and poorly reasoned.

The first step in curbing the judiciary’s excesses is for the President to nominate and the Senate to confirm individuals with a proper understanding of the limited role of the judiciary. The President’s choices will have a big impact on the judiciary because he or she will likely have the opportunity to nominate Supreme Court justices and roughly one-third of federal district court and appeals court judges. The President should nominate individuals whose records demonstrate that they will apply the Constitution and laws according to their original public meaning. Senators should rigorously question nominees about their judicial philosophy and examine their records, and then vote to confirm only nominees who understand the proper limited role of the judiciary.

DID YOU KNOW?

When judges rely on the so-called Living Constitution to make the text comport with what they see as the spirit of the times, they exceed their authority to interpret the Constitution. One example is the doctrine of “evolving standards,” whereby a court looks to the national consensus of states to decide whether a practice violates the Constitution.

FAST FACTS

ABOUT THE SUPREME COURT

“The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment.

—Federalist No. 78, Alexander Hamilton



The **Supreme Court's term** runs from the first Monday in October through the end of June.



The justices **hear oral arguments** from October to April and issue opinions from around Thanksgiving through the end of June.

The **Court agrees to hear** roughly **70 cases** from an average of **7,000 petitions** it receives each term.



To date, the **Court has issued** more than

30,000 opinions.



Only **4** Presidents failed to appoint a single justice to the Supreme Court:



Andrew Johnson



William Henry Harrison



Zachary Taylor



Jimmy Carter



George Washington appointed

11 justices

over the course of his presidency—including the recess appointment of John Rutledge as Chief Justice, whom the Senate rejected.

Andrew Jackson appointed

6 justices

including Chief Justice Roger Taney, author of the infamous *Dred Scott v. Sandford* decision.



Franklin Delano Roosevelt appointed

8 justices

and elevated one to Chief Justice.

William Howard Taft

is the

Only President

to be appointed to the Court. He became Chief Justice eight years after his presidency.



SEATS ON THE SUPREME COURT

1789

6

Congress passes the Judiciary Act, setting the number at **six justices**, including one Chief Justice.

1800

5

Congress reduces the number of **seats to five**. This may have been intended to prevent the incumbent President, Thomas Jefferson, from making an appointment.

1802

6

Congress restores the **sixth seat**.

1807

7

Congress increases the number to **seven justices**.

1837

9

Congress increases the number to **nine justices**.

1863

10

Congress increases the number to **10 justices** to secure a pro-Union majority.

1866

7

Following the Civil War, Congress decreases the number to **seven justices** to prevent Andrew Johnson from making any appointments.

1868

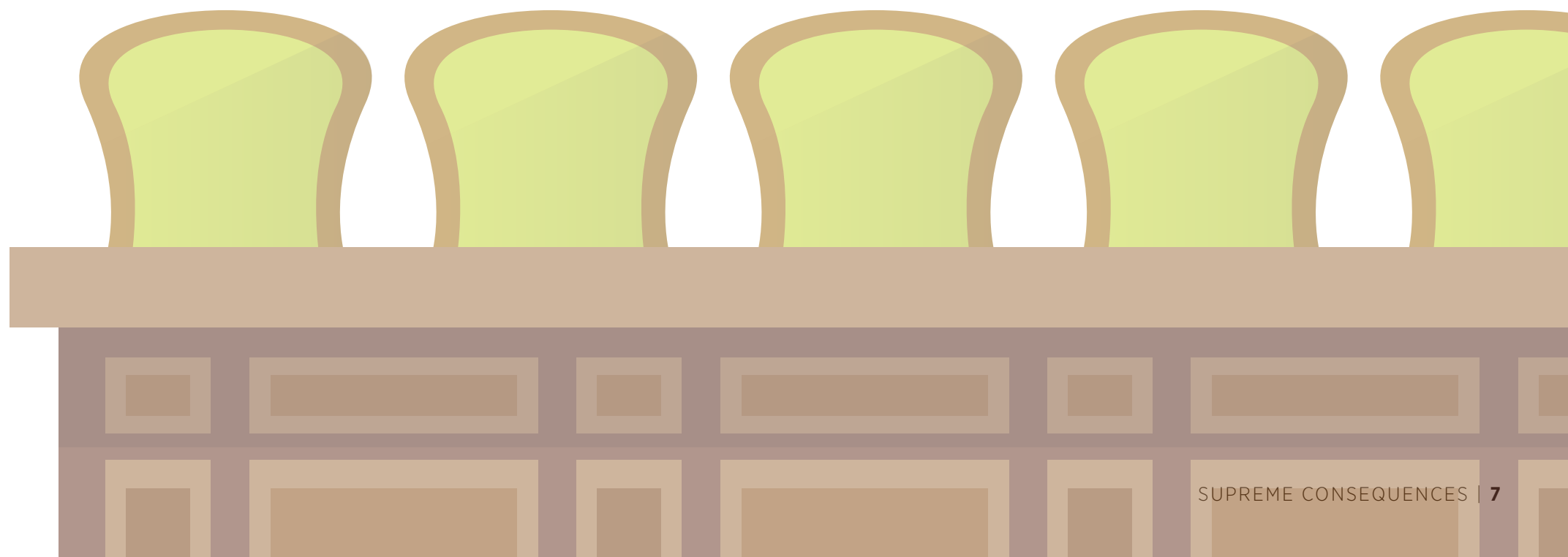
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Congress increases the number to **nine justices**, where it has stayed.

DID YOU KNOW?

In 1937, in an attempt to oust the “Four Horsemen”—conservative justices who opposed the New Deal agenda—Franklin Delano Roosevelt tries to persuade Congress to allow the appointment of an additional justice for every sitting justice who chooses not to retire upon turning 70, with a maximum of six extra justices. The measure fails in the Senate.

Today, there are **nine seats on the Supreme Court**, but that was not always the case. Here's a look at how the number of justices has varied over the years.



SUPREME COURT JUSTICES' TENURE

CURRENT SUPREME COURT JUSTICES



John Roberts
(Bush, 2005)
Tenure: 10 Years
Age: 61



Anthony Kennedy
(Reagan, 1988)
Tenure: 28 Years
Age: 80



Clarence Thomas
(Bush, 1991)
Tenure: 24 Years
Age: 68



Ruth Bader Ginsburg
(Clinton, 1993)
Tenure: 23 Years
Age: 83



Stephen Breyer
(Clinton, 1994)
Tenure: 22 Years
Age: 78



Samuel Alito
(Bush, 2006)
Tenure: 10 Years
Age: 66



Sonia Sotomayor
(Obama, 2009)
Tenure: 7 Years
Age: 62



Elena Kagan
(Obama, 2010)
Tenure: 6 Years
Age: 56



To Be Determined
With the passing of Justice Antonin Scalia at age 79, this seat is currently vacant. Appointed by President Ronald Reagan in 1986, Scalia served on the Supreme Court for nearly 30 years.

*Data current as of summer 2016

Shortest Term

1

YEAR, 18 days

John Rutledge, 1790-1791

Longest Term

36
YEARS,
209 days

William O. Douglas, 1939-1975

Average length of justice's term

16
YEARS

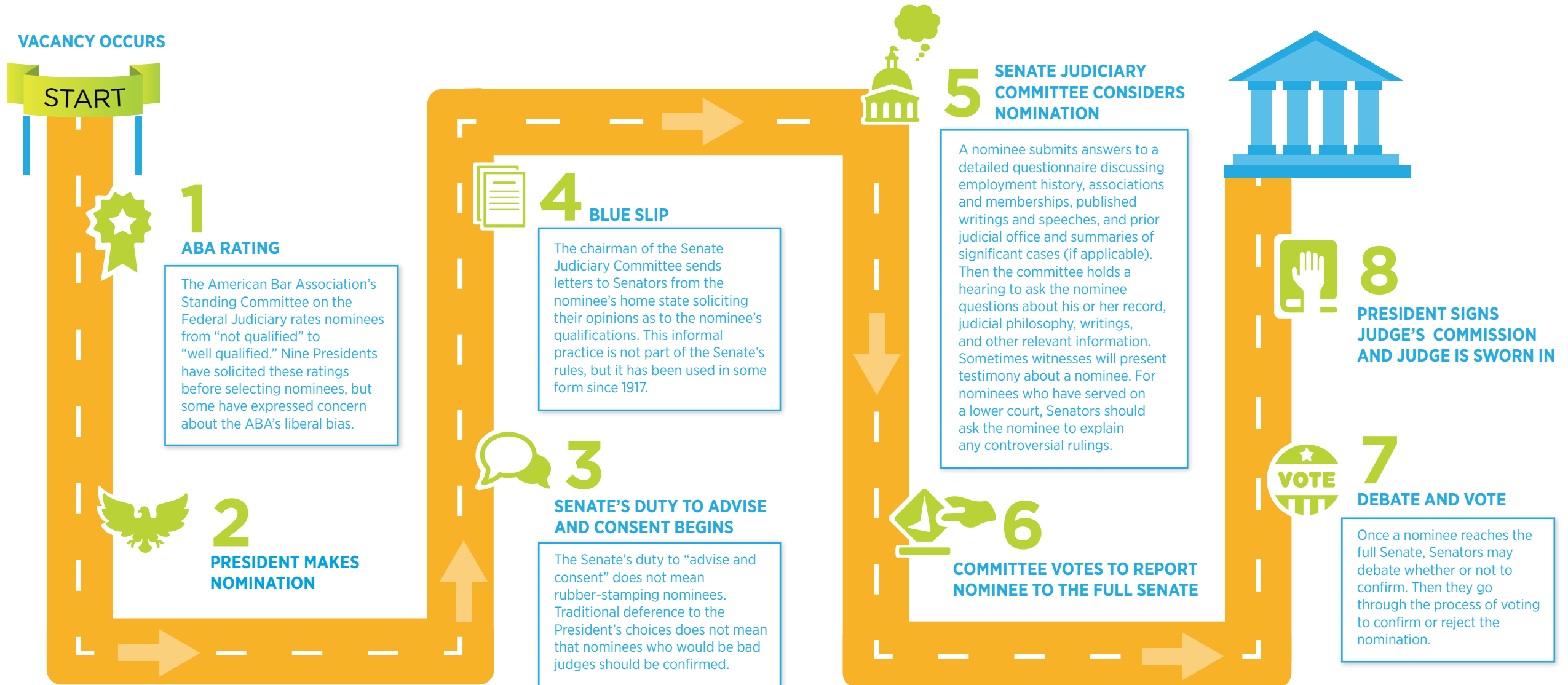
DID YOU KNOW?

Many early Supreme Court justices resigned from the Court to take positions they viewed as more prestigious. For example, in 1791, John Rutledge left the Court to serve on a South Carolina state court; our first Chief Justice, John Jay, ran for governor of New York twice during his tenure on the Court and left in 1795 when he was elected; and David Davis left the Court in 1877 after 15 years to become a U.S. Senator for Illinois.


Until the late 1800s, the justices were required to travel around a circuit of courts to hear appellate cases. This schedule and the harsh travel conditions made the job unappealing to many leading lawyers of the time. Today, an appointment to the Supreme Court is typically the capstone of a long legal career, and justices serve until they are ready to retire altogether or until their deaths.


Source: Supreme Court of the United States, "Frequently Asked Questions: Supreme Court Justices," http://www.supremecourt.gov/faq_justices.aspx#faqjustice4.

THE ROAD TO CONFIRMATION



POSSIBLE ROADBLOCKS TO CONFIRMATION

SCRUTINY  The media scrutinize a nominee's work history, affiliations, and personal life. During the Senate vetting of Supreme Court nominee Robert Bork, journalists dug through his trashcans and visited his video rental store hoping to uncover juicy details about his personal life.

FILIBUSTER  Senators can try to block a nominee's confirmation by using this procedural maneuver. In 1968, such a method was used to prevent Associate Justice Abe Fortas from being elevated to Chief Justice.

SPECIAL INTERESTS  Special-interest groups try to extract assurances that nominees will rule in favor of their causes once confirmed. NARAL Pro-Choice America urged Senators to ask Sonia Sotomayor about her views on the Court's abortion cases before she was confirmed.



"[A] jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution."

—Edwin Meese III,
75th U.S. Attorney General



"[T]he highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."

—Justice Felix Frankfurter

CONFIRMATION

ODDS & ENDS

What happens if a vacancy occurs during a presidential election year?

Supreme Court vacancies in presidential election years are rare.

The last time a nominee was confirmed to a seat that opened up during a presidential election year was in 1932. Republican President Herbert Hoover nominated Benjamin Cardozo on February 15, 1932, and the Republican-controlled Senate confirmed him on February 24.

The last confirmation when the President was not from the same party as the Senate majority occurred in 1888 when Democratic President Grover Cleveland nominated and the Republican Senate confirmed Melville Fuller as Chief Justice.

A current member of the Supreme Court, Justice Anthony Kennedy, was confirmed in a presidential election year (1988), but the vacancy that he filled arose in the previous year and was held over because the Senate defeated the first person nominated to that seat.

Can the President make recess appointments to the Supreme Court?

The Constitution permits the President to fill a judiciary vacancy with a temporary appointment when the Senate is in recess.

Past Presidents, including George Washington and Dwight Eisenhower, made recess appointments to the Supreme Court. These temporary appointments last until the end of the Senate's next session.

There have been nine recess appointments to the Supreme Court.

The Supreme Court determined in *Noel Canning v. National Labor Relations Board* that the Senate alone determines when it is in recess and that a recess lasting less than 10 days is presumptively too short to allow the President to make a recess appointment. When the Senate breaks for the evening, this is not an opportunity for the President to make a recess appointment.

Does the Senate have a duty to confirm?

Though the Constitution says the President "shall nominate" justices, the Senate's obligation to provide "advice and consent" is not fleshed out. The Senate is free to withhold its consent and is not obligated to hold hearings or votes.

To date, the Senate has confirmed 124 of 161 nominations to the Supreme Court.

Of the 36* who were not confirmed, 25 were never voted on by the Senate. This includes six nominees who were later confirmed, such as John Roberts who was first nominated to be an associate justice replacing Sandra Day O'Connor but subsequently was nominated to be Chief Justice after William Rehnquist passed away.

*A nomination to the Supreme Court is pending as of publication.

Source: Josh Blackman, "Nominations to Supreme Court in Election Year with Divided and unified Governments," February 13, 2016, <http://joshblackman.com/blog/2016/02/13/nominations-to-supreme-court-in-election-year-with-divided-and-unified-governments/>.

Source: Barry J. McMillion, "Supreme Court Appointment Process: Senate Debate and Confirmation Vote," Congressional Research Service Report, October 19, 2015, <https://www.fas.org/sgp/crs/misc/R44234.pdf>.

WHAT MAKES A GOOD JUDGE?

A **good judge** is committed to faithfully applying the Constitution and statutes by relying on their original public meaning, understands that a judge's role is limited, and does not issue outcome-oriented decisions.

FAITHFUL

ORIGINALIST

IMPARTIAL

OBJECTIVE

RESTRAINED

TEXTUALIST

PRINCIPLES OVER POLITICS

“[U]nless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.”

RONALD REAGAN

WHAT MAKES A BAD JUDGE?

A **bad judge** interjects subjective policy preferences into the law, strains the text to achieve desired ends, elevates personal sympathy for particular litigants above the requirements of the law, turns to international law to justify a preferred outcome, and reads new rights into the Constitution that are not grounded in the text.

PLAYS LAWMAKER

BIASED

INVENTS RIGHTS

PICKS FAVORITES

LIVING CONSTITUTION

CONTORTS TEXT

END JUSTIFIES MEANS

In “truly difficult” cases, “adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”

BARACK OBAMA

WHY

EVERY

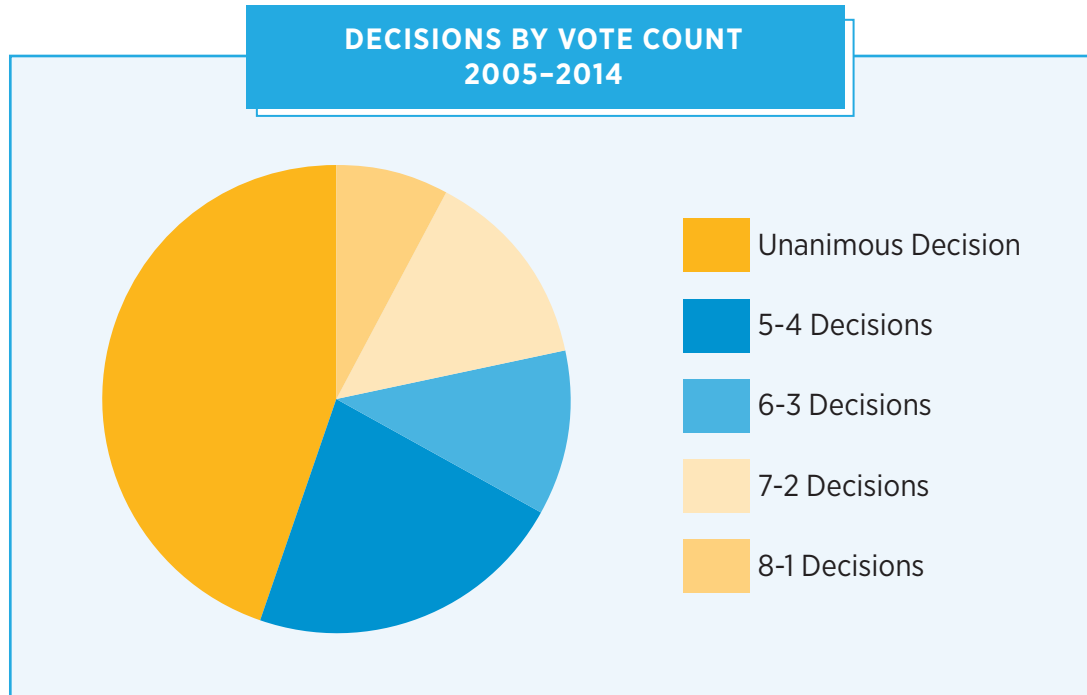
VOTE

MATTERS

Every vote matters in cases before the Supreme Court. Often, big cases are decided by just one vote. While the justices agree in many cases, it's important for a President who is nominating a justice to consider that this one person could make a big difference in nearly a quarter of the cases each term.

Here's a look at the breakdown of votes over the past 10 years:

DECISIONS BY VOTE COUNT
2005-2014



Judges have no business creating new, special rights for individuals or groups that are not in the Constitution. The only way to create new rights is to amend the Constitution as we have done to meet society's needs several times in our nation's history.

Consider some of the important cases in the past 10 years where **one justice** was the deciding vote:

LOSSES



KELO v. CITY OF NEW LONDON
(property rights and eminent domain)



OBERGEFELL v. HODGES
(creating a right to same-sex marriage)



NFIB v. SEBELIUS
(Obamacare and Congress's commerce power)



ARIZONA STATE LEGISLATURE v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION
(rewriting plain text for political purposes)



BOUMEDIENE v. BUSH
(extending due process rights to detainees at Guantanamo Bay)



MASSACHUSETTS v. EPA
(agency can regulate greenhouse gases)

WINS



MCDONALD v. CITY OF CHICAGO and D.C. v. HELLER
(gun rights)



TOWN OF GREECE v. GALLOWAY and BURWELL v. HOBBY LOBBY
(religious freedom)



CITIZENS UNITED v. FEC and MCCUTCHEON v. FEC
(political speech and campaign contributions)



RICCI v. DESTEFANO and PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1
(racial preferences and equality under law)



GONZALES v. CARHART
(partial-birth abortion ban)



SHELBY COUNTY v. HOLDER
(voting rights)

A CLOSER LOOK AT THE LOWER COURTS

It's not just the Supreme Court that matters when it comes to judicial nominations. Many cases never reach the Supreme Court, so it's important that the President also selects good judges for the federal district and appellate courts.

94
federal district
courts with **670**
judges

13
courts of
appeals with **179**
judges

Number of cases filed
in federal district court
in 2014: **390,525**

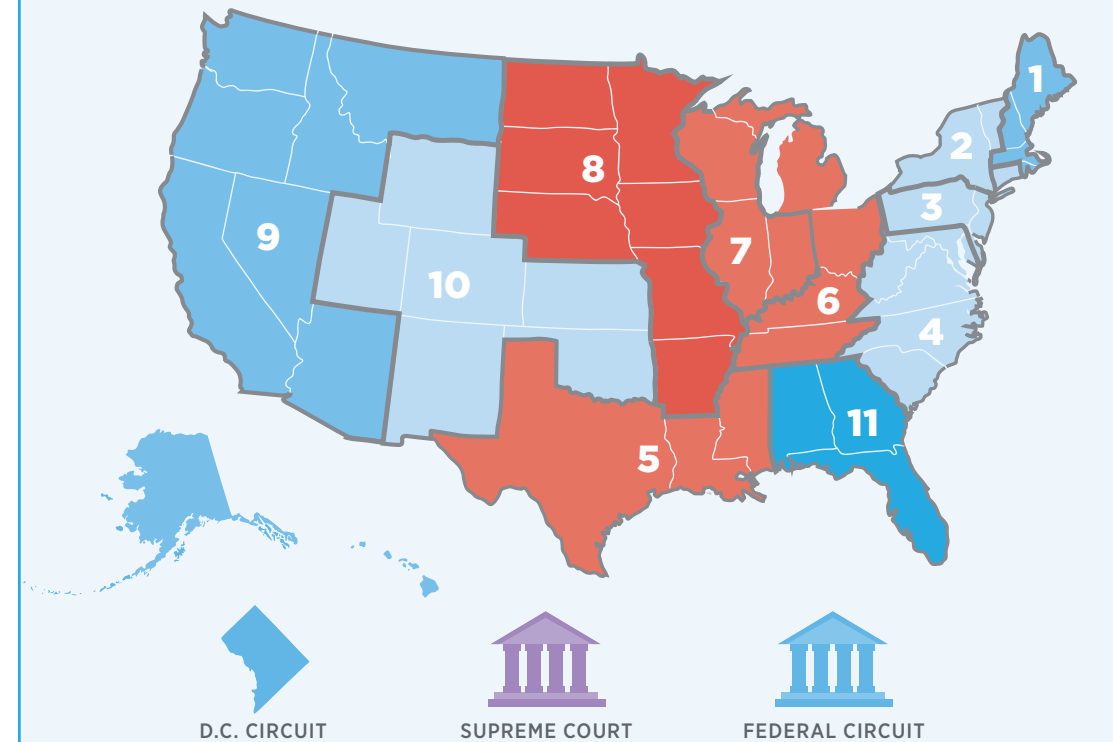
Number of appeals filed
in federal appellate courts
in 2014: **55,623**

DID YOU KNOW?

The Constitution grants courts the power to interpret laws and government actions in appropriate cases to determine whether they are constitutional. No court, not even the Supreme Court, is authorized to make or change the law.

Source: United States Courts, Statistics and Reports, "Federal Judicial Caseload Statistics 2014," <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014>.

WHO CONTROLS THE APPELLATE COURTS?



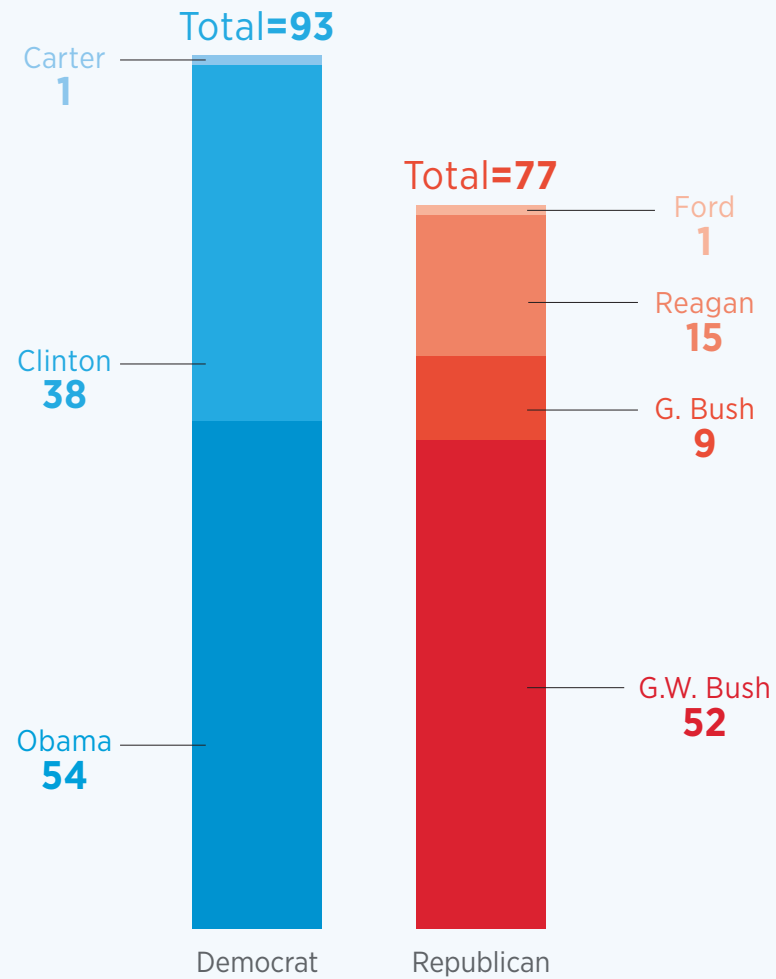
The federal judiciary includes **13 courts of appeals**. There are 12 geographically based circuits, which are the First through Eleventh Circuits and the D.C. Circuit. There is one subject-matter based court, the Federal Circuit, which hears appeals involving patents, trademarks, and government contracts, among others.

Currently, Democrat appointees dominate **nine of these 13 appellate courts**, and the Supreme Court is evenly split between Republican and Democrat appointees.

PERCENTAGE OF JUDGES BY PRESIDENTS' PARTY



WHICH PRESIDENT'S APPOINTMENTS DOMINATE THE APPELLATE COURTS?



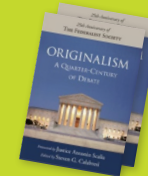
DID YOU KNOW?

Federal judges serve lifetime appointments, and a two-term President could nominate hundreds of judges to the federal judiciary. From trial-level district courts to the Supreme Court, these appointments may have a longer and more profound impact on our society and the rule of law than anything else a President may do in eight years in office.

RESOURCES TO LEARN MORE



What Is the Proper Role of the Courts?
By Robert Alt | The Heritage Foundation



Originalism: A Quarter Century of Debate
By The Federalist Society



Heritage Action for America: Will You Vote for Obama's Reckless Supreme Court?
www.heritageaction.com/judges



How to Spot Judicial Activism: Three Recent Examples
By Elizabeth Slattery | The Heritage Foundation



Keeping a Republic: Overcoming the Corrupted Judiciary
By Judge Robert H. Bork



Who Should Interpret Our Statutes and How It Affects Our Separation of Powers
By Judge Carlos T. Bea



Supreme Court Website
<http://www.supremecourt.gov/about/about.aspx>

THE LEAST DANGEROUS BRANCH?

The judiciary is often the overlooked third branch of government. Yet the judges who populate its ranks wield tremendous power to decide cases that affect the daily lives of millions of Americans. It was not always this way—the Founders believed that the judiciary would be the “least dangerous branch.” Over time, however, judges have inserted themselves into virtually every aspect of life, such as Americans’ ability to own a gun, make campaign donations to political candidates, and own a home free from government interference, among many others.

Judges do not simply appear out of thin air. They are put on the federal bench by the presidents who nominate them and the senators who confirm them. Selecting judges who will be bound by the law and committed to the Constitution is not an ancillary responsibility—it is a central and critical duty, with long-lasting effects. The public, too, has a role to play in shaping the courts, by electing presidents and senators who recognize the proper—and limited—role of judges in our government.

Supreme Consequences: How a President’s Bad Judicial Appointments Threaten Your Liberty reveals the proper role of judges in our government, lays out the road to confirmation for those nominated to be judges, and highlights close cases in which a single Supreme Court justice made the difference in cases of incredible significance.

To view the booklet online go to: www.heritage.org/courts.