SUPREME CONSEQUENCES

How a President’s Bad Judicial Appointments Threaten Your Liberty
TABLE OF CONTENTS

The Federal Judiciary: No Longer the "Least Dangerous Branch" .......................... 2

Fast Facts About the Supreme Court............ 4

Seats on the Supreme Court.......................... 6

Supreme Court Justices' Tenure..................... 8

The Road to Confirmation............................... 10

Confirmation Odds & Ends............................ 12

What Makes a Good or Bad Judge?.............. 14

Why Every Vote Matters .............................. 16

A Closer Look at the Lower Courts ............. 18

Resources to Learn More ............................. 21
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.

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.

**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.

**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.
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
Only President
is the

Presidents who failed to appoint a single justice to the Supreme Court: Andrew Johnson, William Henry Harrison, Zachary Taylor, Jimmy Carter.

Andrew Johnson
William Henry Harrison
Zachary Taylor
Jimmy Carter

To date, the Court has issued more than 30,000 opinions.

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
Only President
is the

Presidents who failed to appoint a single justice to the Supreme Court: Andrew Johnson, William Henry Harrison, Zachary Taylor, Jimmy Carter.
**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.

<table>
<thead>
<tr>
<th>Year</th>
<th>Seats on the Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789</td>
<td>6 Congress passes the Judiciary Act, setting the number at six justices, including one Chief Justice.</td>
</tr>
<tr>
<td>1800</td>
<td>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.</td>
</tr>
<tr>
<td>1802</td>
<td>6 Congress restores the sixth seat.</td>
</tr>
<tr>
<td>1807</td>
<td>7 Congress increases the number to seven justices.</td>
</tr>
<tr>
<td>1837</td>
<td>9 Congress increases the number to nine justices.</td>
</tr>
<tr>
<td>1863</td>
<td>10 Congress increases the number to 10 justices to secure a pro-Union majority.</td>
</tr>
<tr>
<td>1866</td>
<td>7 Following the Civil War, Congress decreases the number to seven justices to prevent Andrew Johnson from making any appointments.</td>
</tr>
<tr>
<td>1868</td>
<td>9 Congress increases the number to nine justices, where it has stayed.</td>
</tr>
</tbody>
</table>

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.

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

SUPREME CONSEQUENCES | 9

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.


*Data current as of summer 2016.
The American Bar Association’s Standing Committee on the Federal Judiciary rates nominees from “not qualified” to “well qualified.” Nine Presidents have solicited these ratings before selecting nominees, but some have expressed concern about the ABA’s liberal bias.

The chairman of the Senate Judiciary Committee sends letters to Senators from the nominee’s home state soliciting their opinions as to the nominee’s qualifications. This informal practice is not part of the Senate’s rules, but it has been used in some form since 1917.

A nominee submits answers to a detailed questionnaire discussing employment history, associations and memberships, published writings and speeches, and prior judicial office and summaries of significant cases (if applicable). Then the committee holds a hearing to ask the nominee questions about his or her record, judicial philosophy, writings, and other relevant information. Sometimes witnesses will present testimony about a nominee. For nominees who have served on a lower court, Senators should ask the nominee to explain any controversial rulings.

The Senate’s duty to “advise and consent” does not mean rubber-stamping nominees. Traditional deference to the President’s choices does not mean that nominees who would be bad judges should be confirmed.

Once a nominee reaches the full Senate, Senators may debate whether or not to confirm. Then they go through the process of voting to confirm or reject the nomination.

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-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.

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-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.*


**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.

“[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.”

---

**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.

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.”

---

**FAITHFUL**

**ORIGINALIST**

**TEXTUALIST**

**IMPARTIAL**

**OBJECTIVE**

**RESTRAINED**

**PRINCIPLES OVER POLITICS**

---

**PLAYS LAWMAKER**

**LIVING CONSTITUTION**

**BIASED**

**CONTORTS TEXT**

**INVENTS RIGHTS**

**PICKS FAVORITES**

**END JUSTIFIES MEANS**
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:

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)

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.
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.

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.

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.

DID YOU KNOW?

The Constitution grants courts the power to interpret laws and government actions in appropriate cases to determine whether they are constitutional.

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**

- D.C. Circuit: 100%
- Supreme Court: 80%
- Federal Circuit: 67%
- 1st Circuit: 58-62%
- 2nd Circuit: 50%
- 3rd Circuit: 50%
- 4th Circuit: 67%
- 5th Circuit: 72%
- 6th Circuit: 100%
- 7th Circuit: 100%
- 8th Circuit: 100%
- 9th Circuit: 100%
- 10th Circuit: 100%
- 11th Circuit: 100%

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.
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](http://www.heritage.org/courts).