



Photo 7.1 Supreme Court Justice Anthony Kennedy swears in Neil Gorsuch as a new member of the Court while President Trump and Gorsuch's wife, Louise, look on.

Today politics lies squarely at the heart of the federal judicial selection process. That is nothing new, but partisan maneuvering in the Senate, which has the power to confirm or reject Supreme Court and lower federal court nominees put forward by the president, went to new extremes during the last year of the Obama administration and the opening months of the Trump administration. The lengths to which the Republican-controlled Senate went to block the confirmation of Obama's judicial nominees gave Trump the opportunity to appoint a backlog of judges when he took office.

The most visible, and arguably the most audacious, obstruction came at the Supreme Court level when Justice Antonin Scalia, one of the Court's most reliably conservative voters, died unexpectedly on February 13, 2016. Senate majority leader Mitch McConnell (R-KY) almost immediately declared that the Republican-controlled Senate would not even consider any nominee put forward by President Obama. Retorting that the Senate had a constitutional duty to act on a nominee, Obama nonetheless nominated Merrick Garland, the centrist chief judge of the D.C. Circuit, on March 16,

2016. He did so with more than ten months left in his term—more than enough time to complete the confirmation process. Despite a long tradition of presidents nominating and the Senate considering Supreme Court nominees in election years, Republicans followed McConnell's lead and blocked hearings on Garland's nomination, which expired on January 3, 2017, at the end of the 114th Congress.¹ This allowed President Trump to nominate Scalia's replacement. His choice, Neil Gorsuch—a judge on the U.S. Court of Appeals for the Tenth Circuit—faced opposition from Senate Democrats, who believed that Republicans had stolen a seat from President Obama. But when Democrats launched a filibuster that Republicans did not have the votes to overcome, Republicans employed the “nuclear option”—changing the rules of the game to prohibit filibusters of Supreme Court nominees and allow them to be approved by a simple majority vote. Democrats had likewise employed the “nuclear option” to end filibusters of lower federal court judges in 2013 when they controlled the Senate.

Well beyond refusing to consider the Garland nomination, Republicans consistently obstructed Obama's lower court nominees during his last two years in office—refusing even to consider 52 of them. During that time, Republicans confirmed only 18 of Obama's 62 district court nominees and only one of Obama's eight court of appeals nominees. Compare that with the last two years of the previous three two-term presidents (all of whom also faced a Senate controlled by the opposition). The Senate confirmed 67 district court and 17 court of appeals judges nominated by Ronald Reagan, 58 district court and 15 court of appeals judges nominated by Bill Clinton, and 58 district court and 10 court of appeals judges nominated by George W. Bush.² The backlog of vacancies when Trump took office combined with new vacancies that would naturally occur during his term allowed him, with the help of the Senate controlled by fellow Republicans, to appoint 30 court of appeals judges in just his first two years in office (a record number). By the end of Trump's first two years in office, the Senate had also confirmed 53 district court judges.³

The resignation of Justice Anthony Kennedy in 2018 allowed Trump to appoint a second justice to the Supreme Court, Brett Kavanaugh, confirmed by a narrow 50–48 vote after contentious confirmation hearings that included dramatic testimony from Christine Blasey Ford alleging that Kavanaugh had sexually assaulted her when they were both in high school. Kavanaugh's confirmation cemented a conservative majority on the Supreme Court. Had the Senate confirmed Garland, it would have been a 5–4 majority leaning ideologically the other way. If he wins a second term, Trump will almost certainly have the opportunity to replace at least one more current Justice. The three oldest members of the liberal wing of the Court will be 91 (Ruth Bader Ginsburg), 86 (Stephen Breyer), and 70 (Sonia Sotomayor) on January 20, 2025, while the three oldest members

of the conservative wing will be 76 (Clarence Thomas), 74 (Samuel Alito), and 69 (John Roberts).

It is not surprising that the appointment process for federal judges has become a high-stakes political battle. The ability to shape the future direction of judicial decision-making through court appointments is no small opportunity. While the Supreme Court is the ultimate arbiter of cases dealing with such politically volatile issues as abortion, affirmative action, gun control, health care reform, immigration, and LGBT rights, to name just a few, the Court decides so few cases each year (roughly 80) that the lower federal courts remain effectively the court of last resort in many instances.

In this chapter, we examine the relationship between the president and the federal courts. In the first section, we analyze the most important influence the president exerts over these courts: the power to nominate their members. We then explore other means by which the chief executive affects the business of the courts and, finally, the reverse situation: how the federal courts, and the Supreme Court in particular, influence the actions of the president.

Presidential Appointment of Federal Judges

Perhaps the greatest impact the president can have on the courts is the selection of federal judges who share the administration's policy goals. These judges include not only the nine justices of the U.S. Supreme Court but also more than eight hundred judges who sit on lower federal courts. The Constitution established (and requires) one Supreme Court. It authorized (but did not require) Congress to create lower federal courts. Congress created lower courts almost immediately through the Judiciary Act of 1789, and that system has grown and evolved since then. These federal judges are nominated by the president, confirmed by the Senate, and serve "during good Behaviour." In other words, they have life tenure subject to impeachment or resignation.⁴ Once they are on the bench, federal judges can influence judicial policymaking for years, usually many more than the president who appoints them.

One might think that impartial judges who objectively apply the law according to set standards of interpretation should all arrive at the same "correct" outcome in cases that come before them. In practice, judges hold very different views about how to interpret legal texts. Moreover, judges are human beings who are influenced, at least in part, by their backgrounds, personal beliefs, and judicial philosophies. As a result, different judges can—and do—reach different conclusions when confronted with the same case. Presidents, therefore, work hard to nominate judges with a judicial philosophy similar to theirs. Interest groups—well aware of the impact

judges can have on policy—also take keen interest in these nominees. So, too, does the Senate, given its power to confirm or reject nominees.

Selection of Lower Federal Court Judges

There are two basic types of lower federal courts: (1) trial courts, which are called “U.S. district courts,” and (2) appellate courts, called “U.S. courts of appeals” or “circuit courts.”⁵ These courts are distinct from state courts. The United States has an overlapping system of state and federal courts, and each state structures its own court system. As a result, the country has fifty-one court systems—one at the federal level and one for each of the fifty states. State courts usually hear cases involving state law, and federal courts hear cases involving federal law. Sometimes a single action can provoke cases in both state and federal court. Timothy McVeigh violated federal law in 1995 when he blew up the Federal Building in Oklahoma City and was therefore tried in federal court. But he could also have been tried in state court for violating state law against murder. Moreover, a case involving state law that begins in state court can be appealed to federal court if it involves a *federal question*. A federal question exists if a state law is alleged to violate federal law, a U.S. treaty, or the U.S. Constitution. It can also exist if police or prosecutors are alleged to have violated the constitutional rights of a criminal defendant. A person convicted in state court because of evidence gathered from an unreasonable search and seizure or a coerced confession could appeal to federal court. If there is no federal question, however, the highest state court remains the court of last resort. The manner of selecting state court judges varies from state to state and is completely unrelated to federal judicial selection.

Federal criminal and civil cases originate in U.S. district courts, which try the cases. Each of these courts has jurisdiction over a geographic area called a district. Each district falls within the boundary of a single state, and, by tradition, judges who come from that state are appointed to a district's courts.⁶ Every state has at least one district. Those with heavier caseloads have more than one, and Congress occasionally adds new districts to accommodate increased caseloads. Because district courts are the point of entry to the federal judicial system, they hear more cases than any other kind of federal court. Currently more than 650 judges staff ninety-four district courts.

The courts of appeals are intermediate appellate courts between the district courts and the Supreme Court. Each has jurisdiction over a geographic area called a circuit, made up of several districts. There are twelve regional circuits: one for the District of Columbia and eleven numbered circuits covering the rest of the country. In addition, the Federal Circuit has nationwide jurisdiction to hear appeals in certain specialized types of cases (such as those involving patents), as well as appeals from the Court

of International Trade and the Court of Federal Claims. Unlike districts, the numbered circuits have jurisdiction over several states: The First Circuit, for example, covers Maine, Massachusetts, New Hampshire, and Rhode Island. The circuit courts hear appeals from the trial courts and decide whether the trial court made a legal error in trying the case. In other words, courts of appeals answer questions of *law* rather than questions of *fact*. Unlike in proceedings in the district courts, there are no witnesses, no testimony, and no jury. Judges on the courts of appeals base their rulings on written legal arguments called briefs and on oral arguments presented by lawyers representing each side of the case. A panel of three judges usually hears appeals. A majority vote of the panel is necessary to overturn a lower court ruling, and the court of appeals issues a written opinion explaining its ruling.

Only about one-sixth of the litigants from the district courts appeal, so the caseload for the courts of appeals is significantly less than the caseload for the district courts. Even though they hear fewer cases than the district courts, the courts of appeals are influential because of their power to set precedents that are binding on the lower courts in their circuits. Because the U.S. Supreme Court accepts such a minuscule number of cases from the courts of appeals for review, the courts of appeals are effectively the court of last resort in more than 99 percent of the cases that come before them.⁷ Therefore, appointments to these courts are especially significant. That is why Trump's 30 appointments in his first two years in office were likely to have a lasting impact.

In theory, the appointment process for lower federal courts is the same as for the Supreme Court: The president nominates, and the Senate either confirms or rejects. In practice, presidents have traditionally had less control over the selection of lower federal court judges than over the selection of Supreme Court justices. This is especially true at the district court level because of a practice called **senatorial courtesy**. This informal rule has existed since the early days of George Washington's administration. It means that the Senate (out of courtesy) will generally refuse to confirm people to federal positions who do not have the support of the senators from the state where the vacancy exists.

Senatorial courtesy was institutionalized in the 1940s through the routinization of the so-called **blue slip** procedure.⁸ Both senators, regardless of party affiliation, from the state where the vacancy occurs receive a letter from the chairman of the Senate Judiciary Committee asking for advice about the nominee. Enclosed is a form, printed on blue paper, for the senator to comment on the nominee. Although senators may put their support or opposition in writing and return the form, it is understood that failure to return the blue slip amounts to a veto that will prevent committee hearings on the nominee—a de facto invocation of senatorial courtesy that usually blocks the nomination.⁹

The blue slip procedure is not a formal Senate rule and therefore has not been applied consistently over the years. For example, there has been disagreement as to whether home-state senators *not* of the president's party should be able to block a nomination. During certain periods, the Judiciary Committee chair counted only blue slip vetoes from senators of the president's party.¹⁰ At other times, the chair held that either home-state senator, regardless of party, could scuttle a nomination. In 2019, Sen. Lindsey Graham (R-SC), the chair of the Senate Judiciary Committee, declared that blue slips would henceforth be honored only for district court nominees—not for the more powerful court of appeals nominees.¹¹ Thus, the Senate confirmed Eric Miller by a vote of 53–46 to fill a seat on the Ninth Circuit Court of Appeals without the support of either home-state senator on February 26, 2019. Senator Dianne Feinstein (D-CA), the ranking Democrat on the Judiciary Committee, issued an angry statement saying that, before Miller, no nominee had been confirmed without the support of at least one home-state senator.¹²

Shifting standards for whether or how to use the blue slip often reflect partisan politics. During the last six years of Bill Clinton's administration, when a Democrat controlled the White House and Republicans controlled the Senate, Judiciary Committee chairman Orrin Hatch of Utah routinely allowed blue slips from home-state Republicans to prevent hearings on many Democratic nominees. In other words, he allowed home-state senators who were not of the same political party as President Clinton to block his nominees. Once George W. Bush became president in 2001, however, Hatch abruptly shifted gears and sought to weaken the power of the blue slip. With a Republican in the White House, Hatch wanted to discount the veto power of home-state Democrats, saying that support of a home-state Republican should overcome opposition of a home-state Democrat. The *New York Times* called Hatch's turnabout both ironic and audacious: Opposition Republicans had for six years "routinely obstructed" Clinton's judicial nominations and were now trying to remove the possibility that opposition Democrats could do the same to Bush.¹³

As a result of senatorial courtesy and the blue slip, presidents traditionally turn to home-state senators for advice about whom to nominate. Home-state senators of the president's party have the most influence, but some presidents—such as Obama—have also sought advice from home-state senators of the opposition party.¹⁴ (Even when they do so, presidents rarely appoint judges of the opposing party.) In the early days of the Republic—when communication was slow and difficult and the president was more isolated and removed from the various states than today—seeking advice made sense. It assumed that home-state senators were better able to identify qualified individuals than the president because they knew more about the existing pool of candidates. Over time, however, senators came to treat district court appointments as a form

of patronage. Robert F. Kennedy, who served as attorney general in his brother's administration, went so far as to call it "senatorial appointment with the advice and consent of the Senate."¹⁵

Political scientist G. Alan Tarr has pointed out that senatorial courtesy has influenced the type of individuals appointed to district courts. Because these appointments have long served as a form of political patronage for home-state senators of the president's political party, Tarr said it was not surprising that roughly 95 percent of all district court judges appointed during the past hundred years had come from the same political party as the appointing president. Tarr also noted that "district court judges have usually 'earned' their positions by active party service in their state prior to appointment."¹⁶

In an attempt to ensure the quality of these judges, the American Bar Association (ABA) created its Standing Committee on the Federal Judiciary in 1946 to review the qualifications of all federal judicial nominees.¹⁷ Republicans on the Senate Judiciary Committee embraced the ABA's role—partly to block some of President Harry S. Truman's Democratic nominees. When Republican president Dwight D. Eisenhower entered office in 1953, he established a formal link between the White House and the ABA. The ABA would review the qualifications of all potential nominees before the president nominated anyone.

By the 1980s, however, Republicans had come to view the ABA with suspicion. Once a conservative organization, the ABA had become more liberal over time. Republicans were especially angry that in 1987 four of the fifteen members of the ABA's standing committee had rated Ronald Reagan's failed Supreme Court nominee Robert Bork "not qualified." In March 2001, President Bush severed the White House link with the ABA—something his father had threatened to do in 1991. In a letter to ABA president Martha W. Barnett, White House counsel Alberto Gonzales, Bush's second-term attorney general, wrote: "We will continue to welcome suggestions from all sources, including the ABA. The issue at hand, however, is quite different: whether the ABA alone—out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts—should receive advance notice of the identities of potential nominees in order to render prenomination opinions on their fitness for judicial service."¹⁸

When Democrats regained control of the Senate from June 2001 through the 2002 midterm elections, and again after the 2006 midterm elections, they reinstated a role for the ABA by promising not to hold hearings on Bush's judicial nominees until the Senate Judiciary Committee received their ABA ratings. Shortly after taking office, President Obama overturned Bush's decision to sever the relationship between the White House and the ABA. Democrats argued that the ABA ratings validate a nominee's professional qualifications and maintained that Bush's attempt to

bypass the ABA was part of an effort to appoint more ideologically extreme judges to the bench. The Trump administration once again jettisoned the ABA's official role in the nomination process, although the ABA said that it would continue to provide its evaluations to the Senate Judiciary Committee.¹⁹ Instead, Trump relied heavily on the conservative Federalist Society to help vet nominees.²⁰

Since Jimmy Carter's administration, presidents have exerted greater control over the selection of lower federal court judges than they used to, especially at the level of the courts of appeals. Some observers view this control as an attempt by presidents to appoint more ideological judges. Ironically, President Carter initiated the reform to institute merit selection of federal judges. He created the Circuit Court Nominating Commission by executive order in 1977. The commission diminished the role of senators in the selection of courts of appeals judges by taking control of the screening process for nominees. Under the new system, the commission would submit a short list of qualified nominees to the president, who would then nominate someone from that list.²¹ Carter also urged senators to create, voluntarily, nominating commissions to advise him on the selection of district court judges from their states. By 1979, senators from thirty-one states had created such commissions.²² The changes were made to help ensure that the awarding of judgeships would be based on qualifications and not used as political patronage.

Despite Carter's emphasis on merit in judicial selection, his appointments were partisan: Over 90 percent of his district court appointments and just over 82 percent of his appeals court appointments were Democrats.²³ Carter also practiced affirmative action when selecting judges. He made a deliberate effort to place women, African Americans, and Hispanics on the federal judiciary—appointing more of each than had been placed on the bench by all previous presidents combined.²⁴

Ronald Reagan transformed the selection process when he took office in 1981. He abolished Carter's commission system and seized control of the selection process as part of an effort to identify nominees who reflected his administration's ideology. He created the President's Committee on Federal Judicial Selection, staffed by representatives of the White House and the Justice Department, to conduct the screening—which included extensive interviews of all leading candidates. Sheldon Goldman called it “the most systematic judicial philosophical screening of candidates ever seen in the nation's history.”²⁵ Reagan's attorney general, Edwin Meese III, bluntly said the appointments were meant to “institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections.”²⁶ By the time he left office, Reagan had set a new record for the number of lower federal judges appointed: 290 district court judges and 78 appeals court judges.²⁷ George H. W. Bush appointed almost two hundred additional federal judges during his four years as president. Presidents

Carter, Reagan, and George W. Bush all benefited from legislation that significantly expanded the number of federal judges, but no president since 1990 has enjoyed a similar expansion. For example, during Clinton's eight years in office, Congress created only 9 additional seats—as compared with 85 under Bush, 85 under Reagan, and 152 under Carter.²⁸

Recent presidents have also faced deliberate slowdowns of the confirmation process. This is largely a result of extended periods of divided government, as discussed in chapter 5. For example, Clinton faced a Senate controlled by opposition Republicans during his last six years in office. In 1997, Republican senators orchestrated a slowdown of the confirmation process to protest what they called Clinton's "activist" (liberal) nominees. Such charges may have reflected partisan hyperbole more than fact. Studies suggest that Clinton's nominees were actually quite moderate, even the nominees confirmed before Republicans took control of the Senate.²⁹ Clinton's appointees also had the highest ABA ratings of the past four presidents.³⁰

As a result of the Republican slowdown, 10 percent of seats on the federal judiciary were vacant by the end of 1997. In the face of such results, even Chief Justice William Rehnquist, a conservative appointed by Reagan, criticized the Senate slowdown. In his annual State of the Judiciary report, he wrote: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down."³¹ In part because of Rehnquist's criticism, Senate Republicans backed away from their slowdown, and the backlog of vacancies eased in 1998. But the delaying tactics returned in 1999 and continued through the rest of the Clinton presidency. In 2000, the Senate confirmed only thirty-nine of eighty-one judicial nominees Clinton put forward, and two other nominees withdrew. Nominations of forty-two judicial candidates remained unconfirmed when Clinton left office in January 2001—thirty-eight of them had never received a Judiciary Committee hearing.³²

Despite the slowdowns and the lack of new judicial seats to fill, Clinton appointed 368 judges to the district courts, courts of appeals, and Supreme Court during his eight years in office. By the end of Clinton's second term, the number of his appointees serving on the courts narrowly surpassed the number of Reagan-Bush appointees still serving, 42.7 percent to 40.7 percent.³³ Even more than Carter had done, Clinton diversified the bench through these appointments. He appointed 108 women (including Ruth Bader Ginsburg—only the second woman, after Sandra Day O'Connor, to serve on the Supreme Court) and 61 African Americans: more of each than Ford, Carter, Reagan, and Bush combined had appointed in nineteen years.³⁴ (See Table 7-1.)

George W. Bush also faced slowdowns. He took office with the Senate evenly divided between Democrats and Republicans. At first Republicans held nominal control (with the tie-breaking vote of Vice President Dick

Cheney), but in June 2001—less than six months after Bush took office—Senator Jim Jeffords of Vermont left the Republican Party, thereby throwing control of the Senate to the Democrats. By October 2001, Bush had submitted sixty judicial nominations, but the Senate had confirmed only eight. Now Republicans accused Democrats of slowing down the confirmation process. They also charged that judicial vacancies would hamper the post–September 11, 2001, war on terrorism and mounted a Senate filibuster against a foreign-aid spending bill as retaliation for the confirmation slowdown. Democrats denied that they had deliberately slowed down the confirmation process as Republicans had done under Clinton, pointing out that they had controlled the Senate for only four months and that the legislative agenda had been interrupted during that time by the terrorist attacks of 9/11 and the recent anthrax scare on Capitol Hill.³⁵ The charges and countercharges further polarized the two sides. Democrats charged Bush with nominating ideologically extreme judges and blocked his nominations of Charles Pickering and Priscilla Owen to the Fifth Circuit Court of Appeals. President Bush, emboldened by his skyrocketing public approval after 9/11, charged Democrats with obstructionism and turned the “vacancy crisis” on the federal bench into a campaign issue during the 2002 midterm elections.³⁶

Republicans regained control of the Senate in the midterm elections, and it appeared that Bush’s nominees would be approved. Bush quickly renominated Pickering and Owen. Although Senate Democrats showed a willingness to vote for moderate nominees—all nine Democrats on the Senate Judiciary Committee voted in favor of Edward Prado, a Bush nominee to the Fifth Circuit Court of Appeals—they continued their vow to block “ideological extremists.” To do so, they resurrected a tool used by Republicans in 1968 to block Lyndon B. Johnson’s nomination of Abe Fortas to be chief justice of the United States: the filibuster. Under Senate Rule 22, it takes a vote of three-fifths of the entire Senate, sixty votes, to end a filibuster. Because Republicans could not muster the necessary sixty votes, Democrats succeeded in blocking ten nominations—prompting a Republican threat to change Senate rules regarding filibusters, a strategy dubbed the “nuclear option,” so that Democrats could no longer use them against judicial nominees. Seven moderate senators from each party, the so-called “Gang of 14,” brokered a temporary compromise that allowed judicial filibusters only in “extraordinary circumstances.” By the time he left office, Bush had appointed 261 judges to the district courts, 59 judges to the courts of appeals, and 2 justices to the Supreme Court.

Judicial vacancies were initially filled at a slow rate under President Obama. The Obama administration contributed to the problem by being slow to make judicial nominations, and Republican obstruction furthered the delay. For example, the time from hearings on judicial nominees to their final confirmation vote more than doubled from George W. Bush to

Obama (from 54 days for district court nominees under Bush to 139 under Obama's first term, and from 63 days for courts of appeals nominees under Bush to 177 under Obama's first term).³⁷ By the end of Obama's first two years in office there was renewed talk of a "vacancy crisis." According to a report by the Alliance for Justice, judicial vacancies grew from fifty-five to ninety-seven during those two years. "Judicial emergencies"—that is, vacancies that occur where case filings per judge exceed six hundred cases in district courts and seven hundred cases in courts of appeals—rose from twenty to forty-six.³⁸

Republicans also revived the filibuster. They used it in May 2011 to block Obama's nomination of Goodwin Liu to fill a vacancy on the Ninth Circuit Court of Appeals.³⁹ They used it again at the beginning of Obama's second term against Caitlin Halligan, who had been nominated to fill a vacancy on the U.S. Court of Appeals for the District of Columbia. Halligan later asked the president to withdraw her nomination. The threat of filibusters meant that Democrats no longer needed just fifty-one votes to confirm a nominee; now they needed sixty.⁴⁰ According to PolitiFact, a total of 36 judicial nominees had been subject to cloture filings (the procedural step to end filibusters) prior to Obama taking office. In less than four years as president, 36 of Obama's judicial nominees—the same number as all his predecessors combined—faced cloture filings.⁴¹ President Obama, while admitting that "neither party has been blameless for these tactics," said that the "pattern of obstruction" had escalated to a point that "just isn't normal; it's not what our founders envisioned."⁴²

Thus, the Democrat-controlled Senate in November 2013 executed the "nuclear option" that Republicans had earlier threatened when Bush was president. In so doing, it took away the filibuster as a tool that could be used to block executive branch and judicial nominees (Supreme Court nominees remained a significant exception until 2017). In so doing, Senate Majority Leader Harry M. Reid (D-NV) said, "The American people believe the Senate is broken, and I believe the American people are right. It's time to get the Senate working again."⁴³ Indeed, the move dramatically increased the number of judicial confirmations, at least in the short run.⁴⁴ Then, during Obama's last two years in office, Republicans regained a Senate majority. This allowed for the delay and obstruction discussed at the outset of this chapter.

Nonetheless, Obama managed to bring real change to the type of judges confirmed during his administration by making a concerted effort to appoint a more diverse set of judges. By the end of his first term, he had already nominated more women and minorities in four years than his predecessor had in eight (see Table 7-1 for the total by the end of his second term). The White House website touted the Obama administration's "unprecedented commitment to expanding the racial, gender, and experiential diversity of the men and women who enforce our laws and deliver

Table 7-1 Race, Ethnicity, and Gender of Appointments to the U.S. District Courts and Courts of Appeals, by Administration, Nixon through Trump's First Two Years

President	Total appointments	Male	Female	White	African American	Hispanic	Asian	Native American
Nixon (1969–1974)	224	223 (99.6%)	1 (0.4%)	215 (96.0%)	6 (2.6%)	2 (0.9%)	1 (0.4%)	0
Ford (1974–1977)	64	63 (98.4%)	1 (1.6%)	58 (90.6%)	3 (4.7%)	1 (1.6%)	2 (3.1%)	0
Carter (1977–1981)	258	218 (84.5%)	40 (15.5%)	202 (78.3%)	37 (14.3%)	16 (6.2%)	2 (0.8%)	1 (0.4%)
Reagan (1981–1989)	368	340 (92.4%)	28 (7.6%)	344 (93.5%)	7 (1.9%)	15 (4.1%)	2 (0.5%)	0
G. H. W. Bush (1989–1993)	185	148 (80.0%)	37 (20.0%)	165 (89.2%)	12 (6.5%)	8 (4.3%)	0	0
Clinton (1993–2001)	366	259 (70.8%)	107 (29.2%)	274 (74.9%)	61 (16.7%)	25 (6.8%)	5 (1.4%)	1 (0.3%)
G. W. Bush (2001–2009)	320	251 (78.4%)	69 (21.6%)	263 (82.2%)	24 (7.5%)	30 (9.4%)	4 (1.3%)	0
Obama (2009–2017)	316	184 (58.2%)	132 (41.8%)	202 (63.9%)	60 (19%)	34 (10.8%)	19 (6.0%)	1 (0.3%)
Trump (2017–2018)	83	63 (75.9%)	20 (24.1%)	76 (91.6%)	1 (1.2%)	1 (1.2%)	5 (6%)	0

Source: Drawn from Tables 2 and 4 in Sheldon Goldman et al., “Picking Judges in a Time of Turmoil: W. Bush’s Judiciary During the 109th Congress,” *Judicature*, 90 (May–June 2007), p. 272 and p. 282; and from Table 6.1 (for Ford and Nixon) from Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), pp. 227–229. Figures for G. W. Bush and Obama are drawn from Tables 6 and 7 of Slotnick et al., “Obama’s Judicial Legacy: The Final Chapter,” *Journal of Law and Courts*, Fall 2017, pp. 394–395 and 400–401. Figures for Trump are drawn from “Judicial Nomination Statistics and Analysis: U.S. District and Circuit Courts, 1977–2018,” *Congressional Research Service*, March 21, 2019, <https://fas.org/sgp/crs/misc/R45622.pdf> and the list of Trump’s judicial nominees at https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump.

justice.” It listed a string a “firsts” ranging from the first Latina appointed to the U.S. Supreme Court to the first openly gay man confirmed to a federal court (President Clinton appointed the first openly gay woman in 1994).⁴⁵ By the end of 2014, Obama had appointed more female, Hispanic, Asian American, and LGBT judges than any other president, and in 2016 he became the first president to nominate a Muslim American to be a federal judge, Abid Riaz Qureshi (the Senate, however, took no action on Qureshi’s nomination, which expired at the end of the 114th Congress).⁴⁶

Selection of Supreme Court Justices

The president clearly dominates the process of selecting members of the U.S. Supreme Court. Despite the constitutional admonition that the Senate offer “advice and consent” on presidents’ nominees, the extent to which presidents seek advice from senators on whom to nominate is minimal. A rare exception came in 1874, when President Ulysses S. Grant formally sought the advice of Senate leaders before nominating Morrison Waite to be chief justice. Bill Clinton is said to have consulted influential Senate Republicans about Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994 before nominating them.⁴⁷ Both were easily confirmed.

Although presidents have more recently come to appreciate and take full advantage of their ability to influence judicial policymaking through *lower* federal court appointments, they have long recognized the importance of Supreme Court appointments. Through its power of judicial review, the Court has the authority—when a legitimate case or controversy is brought before it—to review actions of the other branches of government and the states and to strike down those that violate the Constitution.

First used by the Supreme Court to strike down legislation in *Marbury v. Madison* (1803), the power of judicial review is a critical part of the U.S. system of checks and balances.⁴⁸ Judicial review is a way to police the actions of other government actors and ensure that they act in accordance with the Constitution. It prevents temporary legislative majorities from invading the rights of minorities and keeps strong-willed presidents from thwarting the Constitution. It is, in other words, a protection against “tyranny of the majority” and other abuses of power by government officials.

But judicial review also entails a certain amount of risk. After all, it is up to a simple majority of the Court to determine what the Constitution means and whether a government action violates it. The task may seem easy, but it is not. Many provisions of the Constitution are notoriously vague and ambiguous. As a result, they are susceptible to different interpretations. As we saw in chapter 1, the ambiguity of Article 2 has led to considerable disagreement over the scope of presidential power. Such ambiguity extends to many other provisions of the Constitution. For example, what does “equal protection” mean? “Unreasonable searches and

seizures”? “Cruel and unusual punishment”? The First Amendment says that Congress shall make no law abridging freedom of speech. But what is “speech”? Does it include libel? Campaign contributions? False advertising? Obscenity? Advocacy to overthrow the government? Flag burning? Nude dancing? All of these questions have come before the Court. Smart, reasonable people have disagreed about how to answer them.

The real danger of judicial review lies in the possibility that a majority of the Court might take advantage of the Constitution’s ambiguities to impose its own will. Under the guise of upholding the Constitution, five unelected judges could choose to impose policies they support and nullify those they do not. Judges from both ends of the political spectrum are susceptible to that temptation. Some observers say that is what happened when a conservative majority on the Court struck down government attempts to regulate business in the early twentieth century, or when a liberal majority in the 1960s and 1970s used an unenumerated “right of privacy” to strike down state laws that banned abortion and the use of contraceptives.⁴⁹

Even when the Court is doing its best to apply the Constitution fairly and accurately, answers to many constitutional questions remain a matter of judgment. It is precisely for that reason that Supreme Court appointments matter so much. The Court’s decisions are of vital interest to the president because they affect presidential programs, the operation of the entire political system, and the functioning of U.S. society in general. Presidents seek to affect those decisions through their appointments to the Court, and they tend to approach these nominations with great care.

Nominee Qualifications. Generally speaking, presidents and their aides look at three broad categories of qualifications when screening nominees: (1) professional, (2) representational, and (3) doctrinal.⁵⁰ The Constitution offers no guidance, as it contains no specific qualifications for being a Supreme Court justice. This omission stands in stark contrast to the very specific constitutional qualifications for the president, senators, and representatives. Because federal law has not mandated specific qualifications either, it “is legally possible, though scarcely conceivable, that a non-citizen, a minor or a non-lawyer could be appointed to the Court.”⁵¹

Despite the lack of legally mandated qualifications, presidents recognize the importance of a nominee’s *professional* qualification. Although President Trump severed the official relationship between the White House and the ABA in 2017, he relied on input from the more conservative Federalist Society when vetting nominees. And since the ABA continued to provide its ratings to the Senate Judiciary Committee, senators and the public were still able to use them to gauge the professional merits of a nominee. The ABA bases its ratings largely on the nominee’s professional

qualifications—so, too, do others who assess whether an individual is fit to serve on the Supreme Court, such as the Federalist Society. Every justice who has served on the Court has been a lawyer, and high professional standards have been a basic criterion when selecting and confirming nominees.⁵²

Representational qualifications include the partisan affiliation of potential nominees; their geographic region; and factors such as race, gender, and ethnicity. With rare exceptions, presidents appoint justices from their own political party. Early in the nation's history, geographic balance was also a major consideration for presidents when deciding upon a nominee because Supreme Court justices had the onerous responsibility of “riding circuit”—traveling around the country to preside over appeals in lower federal courts of the particular circuit to which they were assigned. Prior to the Civil War, presidents tried to have at least one justice from each of the circuits. When Congress abolished the requirement of circuit riding in 1891, the main reason for geographic balance disappeared. Still, presidents make some effort to represent different parts of the country on the Court. Occasionally, a president tries to use a Court appointment to curry favor with a particular region of the country. Herbert Hoover and Richard Nixon tried to appoint southerners to the Court as a way to build electoral support in the South.⁵³

Religion, race, gender, and ethnicity have joined geography as representational concerns. Although the Court has historically had a distinctly white, male, and, until recently, Protestant bias, a “Catholic seat” has existed by tradition since 1836, as has a “Jewish seat” since 1916 (except for 1969 to 1993). With Trump's appointment of Kavanaugh in 2018, the Court consisted of five Catholics, three Jews, and one Protestant (Gorsuch, despite being raised Catholic, was an Episcopalian at the time of his appointment).⁵⁴ George W. Bush's appointments of John Roberts and Samuel Alito had secured a Catholic majority for the first time in the Court's history, and Obama extended that majority with the appointment of Sonia Sotomayor in 2009. His appointment of Elena Kagan to replace John Paul Stevens resulted in a Court that for the first time had no Protestant representation. Since 1967, an African American has been a member. Since 1981, there has also been at least one woman (under Obama the number of women serving on the Court at the same time reached a new high: three). Both George H. W. Bush and George W. Bush as well as Clinton gave serious consideration to appointing the first Hispanic to the Court. Such an appointment, it was thought, could help to build support for the president's party among the growing Hispanic population in pivotal electoral states such as California, Florida, and Texas. Obama, with the appointment of Sotomayor, became the first president to do so.

Doctrinal qualifications refer to the perception that a nominee shares the president's political philosophy and approach to public policy issues,

a critical issue given the Court's power to interpret the Constitution and exercise judicial review. Some presidents, such as Ronald Reagan and George W. Bush, made doctrinal considerations a central part of their screening process. Although Reagan's appointment of Sandra Day O'Connor was driven largely by representational concerns, he was careful to select a woman who fit his doctrinal qualifications. His elevation of Rehnquist to chief justice, his appointments of Antonin Scalia and Anthony Kennedy, and his unsuccessful nominations of Robert Bork and Douglas Ginsburg were motivated largely by doctrinal considerations. Trump's appointments of Gorsuch and Kavanaugh were also motivated by doctrinal considerations and resulted in a new 5–4 majority that shifted the balance on the Court.

In contrast, Bill Clinton was somewhat less concerned with doctrinal representation. Although applauded for their representational impact, Ruth Bader Ginsburg and Stephen Breyer actually drew some criticism from liberal Democrats who were distressed that the first Democratic president since Lyndon Johnson with the opportunity to fill vacancies on the Court (Carter made no appointments) appeared to be picking candidates with moderate, mainstream—rather than activist, liberal—constitutional views. Both justices were Democrats who were more liberal than Reagan's nominees, but in the interest of avoiding a confirmation battle in the Senate, Clinton selected experienced, moderate federal appeals court judges rather than ideologues to fill the Court vacancies. Ginsburg and Breyer had strong support from both liberals and conservatives on the Senate Judiciary Committee, and the two won easy confirmation. By 2016, when Obama nominated Merrick Garland, winning support across the aisle had become more difficult. Garland, too, could be described as a moderate, mainstream choice—certainly for a Democratic president's nominee—but this time Republicans did not even allow a hearing. Whether or not a nominee is “in” or “out” of the mainstream, of course, is often in the eye of the beholder. Republicans considered Gorsuch and Kavanaugh to be in the mainstream, although not all Democrats agreed.

Initial Screening and Selection. As David Yalof points out, different presidents go about screening and selecting potential Supreme Court nominees in different ways. Even within a single administration, Yalof identifies several factors that influence the president's selection process. These include (1) the timing of the vacancy, (2) the composition of the Senate, (3) the public approval of the president, (4) attributes of the outgoing justice, and (5) the realistic pool of candidates available to the president.⁵⁵ If the vacancy occurs early in their terms, presidents are usually in a stronger position politically than if the vacancy occurs closer to the end of their terms. If the vacancy occurs shortly before their reelection campaigns or toward the end of their second terms, presidents may be more limited in

the type of nominee they can send to the Senate and may feel compelled to nominate a more moderate, consensus candidate. The same is true if the opposition party controls the Senate or if a president's approval ratings are low. Choice of a successor may also be more limited if the outgoing justice represents a particular religious or demographic group or if the president feels that a particular region of the country needs representation on the Court. And, obviously, presidents are limited by the available pool of candidates and may find it difficult to identify a nominee who fits the precise mix of professional, doctrinal, and representational concerns they would like.

Since 1853, the Justice Department has had formal responsibility for identifying and recommending potential nominees. Historically, the attorney general, the head of the Justice Department, played the primary role in this process. As Yalof notes, however, the growth and bureaucratization of both the White House and the Justice Department have led to the emergence of specialized staff units assigned to vet potential nominees.⁵⁶ The Office of White House Counsel, created as part of the president's personal staff during the Truman administration, now plays a primary role in vetting nominees. Thus, Don McGahn—Trump's first White House Counsel—played an instrumental role in the appointment process in 2017 and 2018.⁵⁷ McGahn was a member of the Federalist Society, whose executive vice president, Leonard Leo—even though he was not a member of the Trump administration—played an important external role in recommending and helping to promote nominees.⁵⁸ That role carried over from the 2016 campaign when Leo helped candidate Trump develop a list of potential nominees that was then released to the public to reassure Trump's base that he would select conservative justices if elected president.⁵⁹ In addition to the role of the White House Counsel, the FBI is responsible for conducting background checks of nominees.

In some administrations, the White House chief of staff and other officials also play a role, and overlapping responsibilities between the White House and the Justice Department have sometimes led to internal power struggles over what type of judges to nominate. When Justice Lewis Powell resigned from the Court in 1987, Attorney General Meese and other Justice Department officials pushed for a staunchly conservative nominee: Robert Bork. White House counsel Arthur B. Culvahouse and chief of staff Howard Baker wanted a moderate consensus nominee. The Justice Department won, but the Senate went on to defeat the Bork nomination in a highly contentious confirmation battle.⁶⁰

Many people have a desire to influence the nomination decision, including other lawyers. The legal community includes professional organizations such as the ABA, whose ratings can affect how the public and the Senate perceive the nominees. Other legal groups, as well as individual lawyers,

also participate in the selection process. They may suggest nominees to the president or announce their evaluations of the person the president nominated. Coalitions of lawyers sometimes sign letters of support for, or of opposition to, specific nominees. Leonard Leo helped to raise money to fund public relations campaigns in support of Trump's nominees. One public relations firm, CRC Strategies, touted its ten-week communications blitz on behalf of the confirmation of Neil Gorsuch on its website, saying that the highlights of its efforts included "9,500+ hits including 60+ TV appearances; 5,000+ quotes in news stories; 1.2 billion media impressions; 50+ million online video views; 116+ million targeted impressions of non-video content; over 670,000 unique website visits."⁶¹

Supreme Court justices themselves occasionally participate in the process by recommending a potential nominee to the president or even lobbying publicly for a candidate. Chief Justice William Howard Taft (1921–1930) was particularly active in that regard, and Chief Justice Warren Burger suggested the nomination of Harry Blackmun in 1970 and O'Connor in 1981.⁶² More recently, press accounts suggested that retiring justice Anthony Kennedy may have helped convince President Trump to nominate his former law clerk Brett Kavanaugh in 2018.⁶³ Interest groups also lobby for and against the initial selection of nominees, although these groups are usually more active during the confirmation process.

As early as the 1880s, interest groups recognized how directly the Supreme Court could affect them, and they began to take an active interest in the Senate confirmation of nominees.⁶⁴ They also began to lobby presidents before nominations were announced.⁶⁵ Today, they sometimes announce their views on nominations even before vacancies on the Supreme Court occur.

Senate Confirmation. Once nominated by the president, a candidate to the Supreme Court must be confirmed by the Senate. Confirmation needs only a simple majority vote, and the Republican-controlled Senate changed the rules in 2017 to prevent the use of filibusters—which would have required nominees to reach a 60-vote threshold. It is unlikely that either Gorsuch or Kavanaugh would have been confirmed had the opportunity for a filibuster been available.

If one excludes consecutive nominations of the same individual by the same president for the same seat on the Court and President Reagan's 1987 nomination of Douglas Ginsburg, which was announced but never formally submitted to the Senate, 155 nominations were submitted to the Senate through Trump's 2018 nomination of Brett Kavanaugh. Of these 155 nominations, 7 of the nominees declined, 1 died before taking office, and 1 expected vacancy failed to materialize. In addition, George W.

Table 7-2 Failed Supreme Court Nominees

Nominee and Date of Nomination	President and Party	Composition of Senate	Action/Date
John Rutledge, 12/10/1795 ^a	Washington	16 PA, 14 AA	Rejected 10–14; 12/15/1795
Alexander Wolcott, 2/4/1811	Madison (DR)	27 DR, 7 F	Rejected 9–24; 2/13/1811
John J. Crittenden, 12/17/1828	J. Q. Adams (AJ)	27 J, 21 AJ	Postponed 23–17; 2/12/1829
Roger B. Taney, 1/15/1835	Jackson (J)	26 J, AJ, 2 other	Postponed 24–21; 3/3/1835
John C. Spencer, 1/9/1844 (re-nominated 6/17/1844)	Tyler (I) ^b	29 W, 23 D	Rejected 21–26; 1/31/1844 (renomination withdrawn 6/17/1844)
Reuben H. Walworth, 3/13/1844 (re-nominated 12/4/1844)	Tyler (I)	29 W, 23 D	Postponed 27–20; withdrawn; 6/17/1844 (renomination withdrawn 2/4/1845)
Edward King, 6/5/1844 (re-nominated 12/4/1844)	Tyler (I)	29 W, 23 D	Postponed 29–18; 6/15/1844 (renomination withdrawn 2/7/1845)
John M. Read, 2/7/1845	Tyler (I)	29 W, 23 D	No action
George W. Woodward, 12/23/1845	Polk (D)	34 D, 22 W	Rejected 20–29; 1/22/1846
Edward A. Bradford, 8/16/1852	Fillmore (W)	36 D, 23 W, 3 other	No action
George E. Badger, 1/3/1853	Fillmore (W)	36 D, 23 W, 3 other	Withdrawn; 2/14/1853

(Continued)

Table 7-2 (Continued)

Nominee and Date of Nomination	President and Party	Composition of Senate	Action/Date
William C. Micou, 2/14/1853	Fillmore (W)	36 D, 23 W, 3 other	No action
Jeremiah S. Black, 2/5/1861	Buchanan (D)	38 D, 26 R, 2 other	Rejected 25–26; 2/21/1861
Henry Stanbery, 4/16/1866	A. Johnson (D)	39 R, 11 D, 4 other	No action ^e
Ebenezer R. Hoar, 12/14/1869	Grant (R)	62 R, 12 D	Rejected 24–33; 2/3/1870
George H. Williams, 12/1/1873	Grant (R)	47 R, 19 D, 7 other	Withdrawn; 1/8/1874
Caleb Cushing, 1/9/1874	Grant (R)	47 R, 19 D, 7 other	Withdrawn; 1/13/1874
Stanley Matthews, 1/26/1881	Hayes (R)	42 D, 33 R	No action
William Hornblower, 12/5/1893	Cleveland (D)	44 D, 40 R, 4 other	Rejected 24–30; 1/15/1894
Wheeler H. Peckham, 1/22/1894	Cleveland (D)	44 D, 40 R, 4 other	Rejected 32–41; 2/16/1894
John J. Parker, 3/21/1930	Hoover (R)	56 R, 39 D, 1 other	Rejected 39–41; 5/7/1930
Abe Fortas, 6/26/1968 ^d	Johnson (D)	64 D, 36 R	Withdrawn; 10/4/1968
Clement Haynsworth Jr., 8/21/1969	Nixon (R)	57 D, 43 R	Rejected 45–55; 11/21/1969
G. Harrold Carswell, 1/19/1970	Nixon (R)	57 D, 43 R	Rejected 45–51; 4/8/1970
Robert H. Bork, 7/7/1987	Reagan (R)	55 D, 45 R	Rejected 42–58; 10/23/1987

Harriet Miers, 10/7/2005	G. W. Bush (R)	55 R, 44 D, 1 other	Withdrawn; 10/28/2005
Merrick Garland, 3/16/2016	Barack Obama (D)	54 R, 44 D, 2 other	No action

Sources: Party division based on <https://www.senate.gov/history/partydiv.htm>. Dates, action, and votes based on <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

Notes: AA = Anti-Administration, AJ = Anti-Jackson (which later became the National Republicans), D = Democrat, DR = Democratic-Republican, F = Federalist, I = independent, J = Jacksonian Democrat, PA = Pro-Administration, R = Republican, W = Whig. Tyler, Fillmore, and Andrew Johnson had been vice presidents who ascended to office when the president died, so they had not been elected president in their own right. Political parties did not formally exist in 1795. President Washington had no political affiliation. Sixteen members of the Senate at that time are typically identified as supporting Washington (Pro-Administration) and thirteen as opposing him (Anti-Administration).

^a Rutledge had previously served as an associate justice. The Senate rejected his nomination to be chief justice.

^b Tyler had been elected vice president as a Whig. When he assumed the presidency he effectively acted as an Independent. Thus, while Whigs controlled the Senate, the situation amounted to divided government.

^c The Judicial Circuits Act of 1866, signed into law on July 23, 1866, reduced the size of the Supreme Court, thereby eliminating the vacancy.

^d Fortas sat as an associate justice when Johnson nominated him to be chief justice.

Bush's nomination of Roberts to fill O'Connor's seat was withdrawn before Senate action and then submitted to fill the chief justice's seat instead. Of the 145 remaining nominations, 118 were confirmed by the Senate. The other twenty-seven may be classified as "failed" nominations because Senate opposition blocked them: The Senate rejected twelve by roll call vote, voted to postpone or table another five, and passively rejected six others by taking no action. Presidents withdrew the remaining four in the face of certain Senate defeat. The number of "failed" nominations rises to twenty-eight if Douglas Ginsburg is included.

As can be seen in Table 7-2, the most recent failed nominee was Merrick Garland, picked by Obama to replace Scalia in 2016. All told, the failure rate of Supreme Court nominees is higher than for any other appointive post requiring Senate confirmation.⁶⁶ Six nominations (seven if you include Douglas Ginsburg) have failed just since 1968, a clear reflection of the concern for the profound effect Supreme Court appointments can have on public policy, and confirmation votes have become closer and more partisan. Gorsuch was confirmed by a 54 to 45 vote (with only three

Democrats voting to confirm); Kavanaugh by a vote of 50-48 (with one Republican voting no and one Democrat voting yes) after emotional testimony by both Kavanaugh and a woman who accused him of sexual impropriety. Sotomayor and Kagan were confirmed by votes of 68 to 31 and 63 to 37, respectively. Roberts and Alito were confirmed by votes of 79 to 21 and 58 to 42. In stark contrast, the earlier nominations of Antonin Scalia (1986) and John Paul Stevens (1975)—both of whom would surely provoke controversy if they had to face the confirmation process today—sailed through the Senate by votes of 98 to 0.

Confirmation is also a test of presidential strength. “Weak” presidents—those who are unelected, those who face a Senate controlled by the opposition, and those in their final year in office—are statistically less likely to secure confirmation of their Supreme Court nominees. An unusually long period of divided government (with the White House controlled by one party and the Senate by another) has added to the contentiousness of confirmation battles. From 1969 through 2019, the same party controlled the Senate and the White House for only twenty-five out of fifty-one years. In contrast, the same party controlled the White House and Senate for fifty-eight out of the sixty-eight years from 1901 through 1968. Also contributing to intense confirmation battles are the ongoing public policy debates over controversial issues such as race, abortion, and gun control—something that journalist E. J. Dionne has called a “cultural civil war.”⁶⁷ Interest groups fan the flames through their efforts for and against nominees. In the twentieth century, interest groups led the opposition to almost all the nominees rejected by the Senate or forced to withdraw. John J. Parker, a southern court of appeals judge nominated by Herbert Hoover in 1930, fell victim to the combined opposition of the American Federation of Labor and the National Association for the Advancement of Colored People (NAACP), who viewed him as antilabor and racist. Labor and the NAACP again joined forces to defeat two Nixon nominees: Clement Haynsworth, a federal court of appeals judge from South Carolina, in 1969 and G. Harrold Carswell, a federal court of appeals judge from Florida, in 1970.⁶⁸ Conservative groups bitterly attacked Johnson’s nomination of Abe Fortas to be chief justice in 1968 because of his liberal decisions in obscenity cases and suits concerning the rights of the accused in criminal proceedings.⁶⁹ A major effort by civil rights, women’s, and other liberal groups contributed to Bork’s defeat in 1987.⁷⁰ In contrast, Miers withdrew her name before many interest groups had taken a stand. Much of the opposition to her came from the conservative base of the Republican Party.

Other problems may arise. Some people considered Fortas’s acceptance of a legal fee from a family foundation and his advising President Johnson on political matters to be unethical activities for a justice of the Supreme Court.⁷¹ Haynsworth was criticized for ruling on cases in which

he had a personal financial interest. Much of the opposition to Carswell from members of the bar, particularly law professors, stemmed from his perceived lack of professional qualifications. Sen. Roman Hruska (R-NE), Carswell's leading supporter in the Senate, made the situation worse when he tried to make the nominee's mediocrity a virtue by saying on national television that mediocre people needed representation on the Supreme Court. Suddenly, Carswell was a national joke. This, coupled with some shockingly racist statements Carswell had made when running for public office ("I believe the segregation of the races is proper and the only practical and correct way of life in our states," and "I yield to no man... in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed"), doomed Carswell's nomination.⁷²

Regular, repeat involvement by interest groups in the Supreme Court confirmation process dates back only to the 1960s or so. Although organized interests attempted to block Senate confirmation of a nominee as early as 1881, their success in blocking three confirmations in three years (Fortas in 1968, Haynsworth in 1969, and Carswell in 1970) marked a turning point. Since then, interest groups have taken an active stand on virtually every Supreme Court nominee, although their involvement accelerated dramatically with Bork in 1987. Starting with that nomination, interest groups moved beyond testifying at confirmation hearings and mobilizing their members to lobby their senators to launching a full-fledged public relations offensive, including television, radio, and print ads; mass mailings; and phone banks to sway public opinion. They also attempted to influence reporters and editorial writers through the use of press briefings and fact sheets they aggressively distributed.

Interest group action corresponded with the increased visibility of Senate Judiciary Committee hearings and floor votes on nominees. Prior to the twentieth century, the confirmation process was shrouded in secrecy. The committee held hearings behind closed doors and rarely even kept records of its proceedings. As the *New York Times* wrote in 1881, the "Judiciary Committee of the Senate is the most mysterious committee in that body, and succeeds better than any other in maintaining secrecy as to its proceedings."⁷³

At that time, the committee usually deliberated without hearing from any witnesses. Interest groups seldom participated in this phase of the process (none testified until 1930), and no nominee appeared before the committee until Harlan Fiske Stone in 1925. Nominees actually thought it improper to answer any questions and maintained almost complete public silence. When a reporter from the *New York Sun* asked Louis Brandeis about his nomination in 1916, Brandeis quickly replied, "I have nothing to say about anything, and that goes for all time and to all newspapers, including both the *Sun* and the moon."⁷⁴ Presidents, too, maintained almost complete

public silence about their nominees. When the full Senate finally voted on a nominee, it almost always did so in closed session and often with no roll call vote. The secrecy effectively minimized the influence of interest groups and any others concerned about the outcome of a nomination—so, too, did the fact that senators then were not popularly elected but chosen by state legislators. The lack of public participation removed the potential threat of retaliation against senators that the electorate now enjoys and on which interest groups can capitalize.

The situation changed in the twentieth century. Ratification of the Seventeenth Amendment to the Constitution in 1913 provided for the direct election of senators, and Senate rules changes in 1929 opened floor debate on nominations. Public opinion now mattered in a very direct way to senators—they were dependent upon it for reelection. The Senate began to use public Judiciary Committee hearings as a way of both testing and influencing public opinion. Since 1981, Judiciary Committee hearings have been broadcast live on television for the entire world to see. The emergence of the modern “public presidency” (see chapter 3) also led to greater involvement by presidents in promoting their nominees. As specialized staff units developed in the White House, they, too, came to be used as a way to secure support for nominees and thereby increase the likelihood of Senate confirmation. The Office of Communications, the Office of Public Liaison (briefly renamed the Office of Public Engagement and Intergovernmental Affairs under Obama), the Office of Political Affairs, and other staff units have all been used in this manner.⁷⁵

At the end of the day, after opponents find fault with a nominee’s qualifications or record and supporters claim the opposite, it all comes down to ideology. How will the nominee vote if confirmed? The president tries to predict how the nominee will perform, but judicial appointees may fail to vote the way the president had hoped. Reagan and George H. W. Bush appointed six justices to the Supreme Court with the avowed hope of overturning *Roe v. Wade* (1973), the controversial abortion rights decision.⁷⁶ Three of those appointees went on to uphold *Roe*.⁷⁷ Some Republicans criticized John Roberts (a George W. Bush nominee) for being the decisive fifth vote to uphold the constitutionality of the Affordable Care Act in 2012; Dwight D. Eisenhower lamented his appointment of Earl Warren as chief justice because of Warren’s liberal voting record on the bench; and Truman—never one to mince words—was furious when Tom Clark, who had been Truman’s attorney general, did not vote on the Court as the president had hoped. “I don’t know what got into me,” Truman later fumed.

He was no damn good as Attorney General, and on the Supreme Court... it doesn’t seem possible, but he’s been even worse. He hasn’t made one right decision that I can think of.... It’s just that he’s such a dumb son of a bitch.⁷⁸

Despite White House chief of staff John Sununu's prediction to George H. W. Bush that David Souter would be a "home run" for conservatives, Souter turned out to be one of the most liberal members of the Court. The in-depth screening of judicial nominees tends to minimize such "mistakes," but no one can completely predict the behavior of individuals once they sit on the Court.

Other Presidential Influences on the Federal Courts

The appointment of federal judges is the primary method by which presidents affect the courts, but presidents have other ways to influence judicial activities. The first is through the solicitor general, whom Robert Scigliano calls "the lawyer for the executive branch."⁷⁹ The second is through legislation that affects the operation of the Supreme Court—a means Congress, too, has tried to use to its advantage and the president's disadvantage. The third is through the enforcement—or nonenforcement—of court decisions.

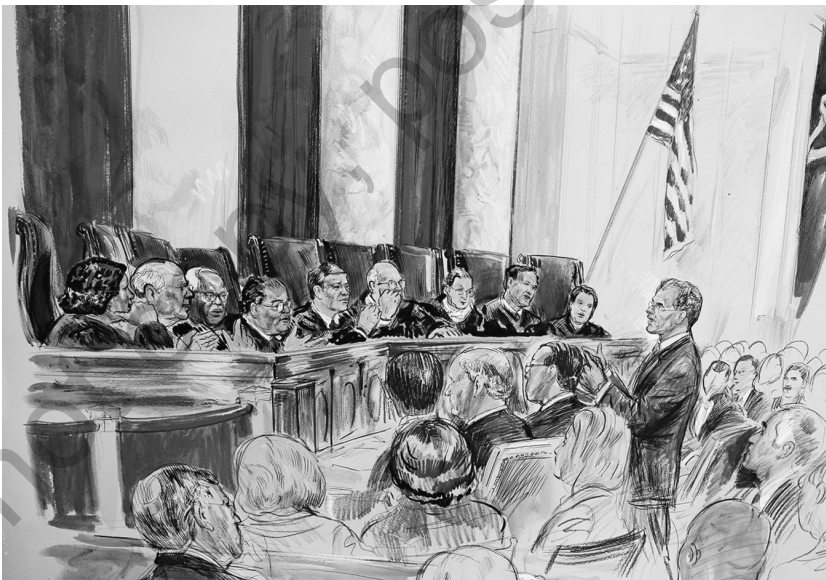
Role of the Solicitor General in the Appellate Courts

The **solicitor general**, appointed by the president with the advice and consent of the Senate, is a major player in setting the agenda of the federal appellate courts. First, the solicitor general determines which of the cases the government loses in the federal district courts will be taken to the courts of appeals. Second, of the cases the government loses in the lower courts, the solicitor general decides which to recommend that the Supreme Court hear. Unlike the courts of appeals, which must take cases properly appealed to them, the Supreme Court chooses the cases it hears.⁸⁰ The Court is more likely to take cases proposed by the solicitor general than by other parties.

Once the Court accepts a case involving the federal government, the solicitor general decides the position the government should take and argues the case before the Court. Thus "the Solicitor General not only determines whether the executive branch goes to the Supreme Court but what it will say there."⁸¹ And what it says there usually advances the policy goals of the incumbent president.⁸² Moreover, the solicitor general's influence is not restricted to cases in which the federal government itself is a party. He or she also decides whether the government will file an *amicus curiae* (friend of the court) brief supporting or opposing positions by other parties who have cases pending before the Court.

Amicus filings by the solicitor general increased dramatically in the twentieth century. Steven Puro, who analyzed the briefs filed from 1920 through 1973, found that 71 percent occurred in the last twenty years of that period.⁸³ He concluded that whether by its own initiative or as a result of an invitation from the Court, the federal government participated as amicus in almost every major domestic question before the Court since World War II. Particularly prominent is the government's entrance into the controversial issues of civil liberties, civil rights, and the jurisdiction and procedures of the courts.

When the federal government becomes involved in a case before the Supreme Court, it is usually successful. Scigliano's analysis of Court opinions chosen at ten-year intervals beginning in 1800 shows that the United States consistently won 62 percent or more of its litigation there. Its record as amicus is even more impressive. Puro found that in the political cases he examined, when the federal government participated, it supported the winning side almost 74 percent of the time. An analysis of race discrimination employment cases from 1970 to 1981 showed that the government won 70 percent of the cases in which it was a direct party and 81.6 percent of those in which it filed amicus briefs.⁸⁴



This courtroom sketch captures the emotional argument delivered by U.S. solicitor general Donald Verrilli on March 27, 2012, to the U.S. Supreme Court asking them not to overturn the historic health care reform act, officially known as the Affordable Care Act and more popularly as Obamacare.

Much has been written about why solicitors general are so successful in their appearances before the Supreme Court. Kevin T. McGuire argues that it really boils down to one thing: litigation experience.⁸⁵ They are the prototypical “repeat player.” Solicitors general or members of their staff argue far more cases (124 from 2013 through 2017) than any other party, including any law firm in the country (the most cases that any single law firm argued from 2013 through 2017 was 27).⁸⁶ They therefore develop a great deal of expertise in dealing with the Court. This expertise translates into high-quality briefs and an intimate understanding of the workings of the Court. Solicitors general may also build up credit with the Court because they help the justices manage their caseload by holding down the number of government appeals. Christopher Zorn also notes that amicus filings by the solicitor general “are highest when both the administration and the Court share similar policy preferences, and drop off substantially when those preferences diverge.” Zorn concludes that, like other litigants, “The solicitor general appears to explicitly take into account the probability that his position will be received favorably by the Court when formulating his litigation strategies.”⁸⁷

The Reagan administration used the solicitor general’s office particularly aggressively to promote its conservative policy agenda.⁸⁸ In tandem with Reagan’s appointments to the Supreme Court and lower federal courts, Solicitor General Rex Lee led this “other campaign” to persuade the Supreme Court to change previous rulings on matters such as abortion, prayer in the public schools, busing, affirmative action, the rights of the accused in criminal cases, and federal-state relations.⁸⁹ Lincoln Caplan argued that this activity marked a shift away from the solicitor general’s traditional posture of restraint to a posture of aggressively pushing the Court to take cases that advanced the administration’s social policy agenda. The result, according to Caplan, was a temporary loss of the justices’ trust in the solicitor general’s presentation of facts and interpretation of the law.⁹⁰ Succeeding presidents did not use the solicitor general’s office this way—at least until Trump. In the early months of the Trump administration, his solicitor general’s office switched sides in four cases before the Supreme Court.⁹¹ As Adam Liptak, a lawyer who covers the Supreme Court for the *New York Times*, noted, such reversals come “at a cost to the office’s prized reputation for continuity, credibility and independence.” He warned that the legal U-turns could “try the justices’ patience.”⁹² Before Trump became president, political scientist Richard L. Pacelle Jr. noted the many pressures that solicitors general now face:

In trying to assist the Court as tenth justice or fifth Clerk, while fulfilling the president’s agenda as “attorney general as policy maker” or pursuing the Justice Department’s more neutral obligations as the “attorney general as law enforcement officer,” the

solicitor general has to balance a number of roles. In attempting to fulfill these roles, the solicitor general has several potentially competing constituencies to satisfy. When these factors move in the same direction, there are opportunities for the solicitor general, but that was rare in the last half-century, as divided government has been the rule.⁹³

Legislation Affecting the Supreme Court

The president also can affect the actions of the Supreme Court through legislation. Presidential authority to propose bills to Congress and to work for their adoption, as well as the power to oppose measures favored by members of Congress and, if necessary, to veto them, means the president can influence legislation affecting the Court. At the same time, Congress can pass legislation concerning the Court that threatens the president's power.

In 1937, Franklin D. Roosevelt became actively involved in trying to get Congress to exercise its power to expand the size of the Supreme Court. The Constitution grants Congress the power to establish the number of justices, and Congress has changed it several times. Historically, however, Congress has done so without prompting from the president. Sometimes it has altered the size of the Court in an effort to thwart a particular president. In the latter days of the John Adams administration, the lame-duck Congress—still controlled by the Federalists—passed the Judiciary Act of 1801. That act reduced the number of justices from six to five in an attempt to prevent the incoming president, Democratic-Republican Thomas Jefferson, from appointing a replacement for ailing justice William Cushing. (Because justices have life tenure, the size of the Court would not actually decrease until a justice left the bench.) The Democratic-Republicans quickly repealed the 1801 law and restored the number of justices to six when they took control of Congress later that year. In 1807, the Democratic-Republican Congress increased the number of justices to seven to accommodate population growth in Kentucky, Tennessee, and Ohio. The Federalists' attempt to thwart President Jefferson failed, and he went on to name three justices. Ironically, Justice Cushing recovered and lived until 1810; his successor was named by James Madison, not Jefferson.

Congressional manipulation of the size of the Court so as to affect presidential appointments also occurred in the 1860s. The 1863 Judiciary Act expanding the Court from nine to ten members enabled Abraham Lincoln to appoint Stephen J. Field, who subsequently supported the president on war issues. Shortly thereafter, the Radical Republicans, who controlled Congress, passed legislation reducing the number of justices to prevent Lincoln's successor, Andrew Johnson, from naming justices they feared would rule against the Reconstruction program. Soon after Ulysses S. Grant

was inaugurated in March 1869, the size of the Court was again expanded; this expansion, plus a retirement, enabled Grant to appoint Justices William Strong and Joseph P. Bradley. Both voted to reconsider a previous Supreme Court decision, *Hepburn v. Griswold*, that had declared unconstitutional the substitution of paper money for gold as legal tender for the payment of contracts. The new decision validated the use of “greenbacks” as legal tender.⁹⁴ The three successive changes in the size of the Court within a six-year period brought the results Congress desired.

Roosevelt’s “Court packing” proposal was different from these earlier examples because of his aggressive efforts to promote congressional action. Frustrated by the invalidation of much of the early New Deal legislation—between January 1935 and June 1936 the Court had struck down eight separate statutes—Roosevelt proposed legislation in early 1937 that would permit him to appoint one justice, up to six in number, for each sitting member of the Court who failed to retire voluntarily at age seventy. Buoyed by his landslide electoral victory in 1936 and confident that the Democrat-controlled Congress would follow his lead, Roosevelt announced the proposal at a press conference without consulting with members of Congress. Samuel Kernell points to it as an early, failed attempt at “going public.”⁹⁵ Although FDR contended that the additions were necessary to handle the Court’s caseload, it was patently clear that his real purpose was to push the Court to vote differently. The proposal stimulated outrage from members of the bar, the press, and many of Roosevelt’s political supporters in Congress who were angered that they had not been consulted about it. At this point, Justice Owen J. Roberts, a centrist who had been aligned with four conservative colleagues in striking down New Deal legislation, began to vote with the other four justices to uphold the legislation and give FDR the new majority he had been seeking. The unpopularity of Roosevelt’s proposal, Justice Roberts’s mitigating action (which observers dubbed “the switch in time that saved nine”), and the sudden death of Majority Leader Joseph Robinson of Arkansas, who was leading the president’s effort in the Senate, resulted in Congress’s failure to adopt the Courtpacking plan. Kernell calls it “FDR’s most stunning legislative failure in his twelve years in office.”⁹⁶ Yet Roosevelt won the legal battle anyway. Once Roberts switched his vote, conservative members—now in the minority—began to leave the Court. By the time he died, Roosevelt had managed to appoint all nine justices and secure a majority willing to uphold his policies.

In addition to its power to change the size of the Court, Congress can also pass legislation altering its appellate jurisdiction.⁹⁷ President George W. Bush proposed and the Republican-controlled Congress passed the Military Commissions Act of 2006, which stripped federal courts of jurisdiction to hear habeas corpus petitions from detainees at Guantánamo Bay. When he signed the act into law on October 17, 2006, Bush called it “one of the most important pieces of legislation in the war on terror.”⁹⁸ A three-judge panel

for a U.S. court of appeals voted 2–1 to uphold the law, but in 2008 the U.S. Supreme Court reversed it by a 5–4 vote in *Boumediene v. Bush*.⁹⁹ The 2008 Republican Party platform endorsed jurisdiction-stripping in other areas. Noting that “a Republican Congress enacted the Defense of Marriage Act, affirming the right of states not to recognize same-sex ‘marriages’ licensed in other states,” the platform urged Congress “use its Article III, section 2 power [to withdraw appellate jurisdiction] to prevent activist federal judges from imposing upon the rest of the nation the judicial activism in Massachusetts and California.”¹⁰⁰ Courts in both states had ruled that laws banning same-sex marriage violated each state’s constitution. Congress did not follow the advice of the platform. With its jurisdiction intact, the U.S. Supreme Court ruled state-level bans on same-sex marriage to be unconstitutional in *Obergefell v. Hodges* in June 2015. The vast majority of jurisdiction-stripping proposals have failed.

Presidents occasionally urge Congress to propose constitutional amendments to overturn Court rulings or lobby for the passage of legislation that might undermine existing rulings. Republican presidents Reagan and George H. W. Bush sought to overturn *Roe v. Wade* by pressuring Congress to propose a constitutional amendment outlawing abortion. Although unsuccessful in this effort, both presidents signed legislation that limited use of federal funds for abortions and made access to abortions more difficult. Bush also supported a constitutional amendment to overrule a controversial Supreme Court decision, *Texas v. Johnson* (1989), which permitted flag burning as a form of protected symbolic speech.¹⁰¹ More recently, President Obama called for a constitutional amendment to overturn the 2010 Supreme Court decision in *Citizens United v. Federal Elections Commission*, which held that the free speech clause of the First Amendment prohibits government from limiting corporate and union spending on electioneering communications.¹⁰² Opposition to the ruling continues. In May 2019, Rep. Adam Schiff (D-CA) introduced a constitutional amendment to overturn *Citizens United*, saying, “Amending the Constitution is an extraordinary step, but it is the only way to safeguard our democratic process against the threat of unrestrained and anonymous spending by wealthy individuals and corporations.”¹⁰³ If history is any indicator, the likelihood of its passage is slim.

Enforcement of Court Decisions

The federal courts have the authority to hand down decisions on cases within their jurisdiction, but they have no independent power to enforce their decisions. Lacking both the power of the purse and of the sword, the Supreme Court depends upon the executive branch to enforce its rulings. President Eisenhower called out federal troops in 1957 to enforce court-ordered school desegregation in Little Rock, Arkansas. The order was

an outgrowth of the Court's landmark *Brown v. Board of Education* (1954) ruling that overturned the "separate but equal" doctrine of *Plessy v. Ferguson* (1896).¹⁰⁴

Sometimes less forceful action by the president helps to bring about compliance with Supreme Court rulings. President John F. Kennedy, in a June 1962 press conference, publicly supported the Court's controversial ruling in *Engel v. Vitale*, which banned state-sponsored prayer in public schools, and set an example for others to follow.¹⁰⁵ Presidents also set an example by complying with court orders aimed at them. Immediately after the Court held in 1952 that President Truman's seizure of the steel mills was unconstitutional, the president ordered the mills restored to private operation.¹⁰⁶ Likewise, President Nixon complied with the Court's 1974 ruling in *United States v. Nixon* that he turn over to a federal district court tapes of his conversations with executive aides.¹⁰⁷ That action produced evidence of the president's involvement in the Watergate affair, which led to the House Judiciary Committee's approving three articles of impeachment against him and ultimately to Nixon's resignation.

Some presidents have defied—or threatened to defy—the Court. The fear that President Jefferson's secretary of state, James Madison, would (with the president's blessing) defy a court order to deliver commissions that would seat some Federalist judges probably influenced John Marshall's opinion in *Marbury v. Madison*. Marshall gave the Jefferson administration what it wanted—it did not force delivery of the commissions—but it did so by creating the power of judicial review. More blatantly, President Lincoln once ignored a federal court ruling that declared his suspension of habeas corpus unconstitutional.¹⁰⁸ But Lincoln's response was an exception to the rule, for chief executives typically have enforced judicial decisions, even when they would have preferred not to do so. When the justices struck down the Gun Free School Zones Act in *United States v. Lopez* (1995), President Clinton strongly criticized the decision and ordered Attorney General Janet Reno to come up with other ways to keep guns out of schools, but he did not defy the ruling.¹⁰⁹

As discussed in chapter 1, George W. Bush embraced a theory of presidential power known as the unitary executive. A core element of that approach is the idea of "coordinate construction"—that presidents have the power to interpret the Constitution just as courts do. Rather than veto the legislation or wait for courts to rule on their constitutionality, Bush quietly used "signing statements" to indicate that he would not enforce those provisions of laws he found problematic. By the time he left office, Bush had challenged more than 1,100 specific provisions of bills he signed.¹¹⁰ For example, he used signing statements to signal that he would not enforce the provision of the Patriot Act that required the president to report to Congress when the executive branch secretly searches homes or seizes private papers. Another signing statement said that he reserved the right to

ignore the McCain amendment forbidding U.S. officials to use torture.¹¹¹ Sometimes the signing statements were so general that it was not clear what provisions the president might choose not to enforce. But when Congress passed a law requiring the attorney general to submit to Congress a detailed list of provisions of bills that were not being enforced by the administration, Bush used a signing statement to reiterate presidential authority to withhold information from Congress—including such a list—whenever he deemed it necessary.¹¹² The use of signing statements, the embrace of coordinate construction, and his strong criticism of “activist” judges, suggested Bush’s willingness to substitute his judgment of how the Constitution should be interpreted for that of the federal courts.

Moreover, Bush’s expansive view of presidential war power held that presidents have broad authority to act unilaterally to promote the nation’s interests. Taken to its extreme, this meant that presidents, in some instances, could take actions contrary to the Constitution. If that were the case, it followed that presidents could claim the authority to disobey the courts in such instances (as Lincoln did with regard to habeas corpus). Bush strongly asserted the view that his subordinates in the executive branch should not report directly to Congress. As noted by the ABA’s Task Force on Presidential Signing Statements, he did so repeatedly “even though there is Supreme Court precedent to the effect that Congress may authorize a subordinate official to act directly or to report directly to Congress.”¹¹³ When Congress passed a law requiring that government scientists report their findings directly to Congress so that they could not be censored by the administration, Bush used a signing statement to prevent enforcement of the law. Although President Obama criticized President Bush’s use of signing statements, he also used them under some circumstances, issuing forty-one of them during his eight years in office. President Trump, too, continued their use. Obama also embraced a broad interpretation of prosecutorial discretion to avoid enforcing laws that would force the deportation of undocumented immigrants who entered the United States before their sixteenth birthday—an interpretation that Trump reversed in September 2017 through executive action.¹¹⁴

Judicial Oversight of Presidential Action

Through its power of judicial review, the Supreme Court has the ability to invalidate presidential actions and those of other parts of the executive branch. This is a significant check on presidential power but has been used infrequently. The founders originally left open the question of who had the final power to interpret the Constitution. If, as Jefferson contended, each branch has the authority to interpret the Constitution as far as its own

duties are concerned, then the president would be the judge of the constitutionality of executive actions. As a result of *Marbury v. Madison*, however, the Supreme Court has the power to make the final judgment on such matters. Although *Marbury* was decided in 1803, the Court did not declare a presidential action unconstitutional until after the Civil War.

Only a handful of presidents have been the objects of major Court decisions invalidating their actions. The Court will likely rule on a variety of Trump's actions, ranging from his declaration of a national emergency to spend money on a wall between the U.S. and Mexico to his invocation of executive privilege to thwart congressional investigations, but Trump won the first major challenge to one of his policies to come before the Court. By a 5–4 vote, the Supreme Court upheld Trump's the third iteration of his controversial ban on travel from several predominantly Muslim countries.¹¹⁵

Even when invalidating a specific presidential action, the Court has often endorsed a broad reading of presidential power. For example, the Court, as previously noted, invalidated President Truman's seizure of steel mills during the Korean War.¹¹⁶ Truman argued that government seizure to keep open the steel mills, which were involved in a labor dispute that threatened to shut them down, was essential to the war effort. But in seizing the mills, Truman ignored provisions of the Taft-Hartley Act, which had passed over his veto. The law permitted the president to obtain an injunction postponing for eighty days a strike that threatened the national safety and welfare. Instead, he issued an executive order seizing the mills, based on his authority under the Constitution and U.S. law and as commander in chief. The steel companies protested the seizure as unconstitutional, and the case went to the Supreme Court.

By a 6–3 vote, the Court invalidated the president's move. Although six justices voted against the specific action in question, six justices (three in the majority plus the three dissenters) explicitly recognized that presidents have a range of "inherent" power to take actions not explicitly authorized by the Constitution. The dissenters said that power was broad enough to cover Truman's seizure of the mills. The other three who recognized some degree of inherent power stressed that such power is not absolute and that it was not broad enough to cover a situation such as this in which the president went against the will of Congress. Even though the case invalidated an action taken by a specific president, it set a precedent that actually *expanded* presidential power through the Court's recognition of inherent power.

Similarly, a unanimous Court in *United States v. Nixon* ruled against President Nixon's refusal to surrender subpoenaed White House tapes to Watergate special prosecutor Leon Jaworski.¹¹⁷ In refusing to surrender the tapes, Nixon claimed the existence of an "executive privilege" relating to private conversations between chief executives and their advisers.

Although the Court rejected Nixon's specific claim of privilege, it recognized for the first time that the principle of executive privilege did have constitutional underpinnings. As with *Youngstown Sheet and Tube Co.*, the Court ruled against a specific exercise of presidential power while at the same time expanding the general scope of presidential power.¹¹⁸

The Court has been especially deferential to presidential power in the realm of foreign affairs. In *United States v. Curtiss-Wright Export Corp.* (1936), the Court suggested that presidents might have a wider degree of discretion in foreign affairs than they do in domestic affairs.¹¹⁹ Justice George Sutherland went so far as to call the president "the sole organ of the federal government in the field of international relations."¹²⁰ Similarly, the Court has recognized that presidents have broad power to respond to military emergencies and wage war even without a congressional declaration of war. In *The Prize Cases* (1863), the Court recognized President Lincoln's power to impose a military blockade on southern ports—an act of war—even though Congress had not yet spoken.¹²¹ During World War II, the Court upheld broad executive power to impose the forced relocation of Japanese Americans and others of Japanese ancestry to federal detention centers.¹²² In 1981, the Court upheld the power of the president to seize Iranian assets and use them as a bargaining chip to help free American hostages held in the 1970s.¹²³ But the Court limited efforts by the Bush administration to curtail the civil liberties of detainees at Guantánamo Bay. In *Hamdan v. Rumsfeld* (2006), the Court ruled 5–3 (Chief Justice Roberts did not participate) that the president did not have inherent power to require that the detainees be tried by military commission rather than in federal court.¹²⁴ In response to the setback, President Bush introduced and the Republican-controlled Congress promptly passed legislation that authorized the use of such tribunals and curtailed the habeas corpus rights of detainees—an action that the Supreme Court then struck down in *Boumediene v. Bush*.¹²⁵

Of course, the Court's power of judicial review can also be used to challenge domestic legislation spearheaded by a president. Thus, Obama found his signature achievement—the Affordable Care Act (ACA)—challenged in two major cases before the Supreme Court. The Court, in a 5–4 decision written by Chief Justice Roberts in 2012, upheld Congress's power to impose a financial penalty to enforce the individual mandate—the portion of the act that requires everyone to purchase insurance—saying that it was a valid exercise of Congress's power to tax.¹²⁶ The Court subsequently accepted another challenge to the law. That case, *King v. Burwell*, questioned whether the U.S. government regulation that offers tax credits to individuals who purchase competitively priced health insurance through the federal insurance marketplace, Healthcare.gov, is constitutional. Challengers argued that the ACA allowed such credits to be given

only to individuals who purchase insurance through state-run exchanges, while the law's supporters argued that the law intended to cover both. A win by the challengers would have severely undermined the ACA by taking away tax credits from as many as six million Americans, but the Supreme Court ultimately upheld the tax credits in a 6–3 ruling, again written by Roberts.

Obama publicly chafed at this and other legal challenges to his policies, saying that the Supreme Court should not have accepted the challenge to the tax credits and expressing frustration at a federal district court ruling that at least temporarily blocked his use of executive orders to implement immigration reform.¹²⁷ It was not his first public rebuke of the judiciary. In his 2010 State of the Union address, President Obama criticized the Supreme Court's *Citizens United* ruling in front of a group of the justices, saying that it would “open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.” Justice Alito could be seen shaking his head and mouthing the words, “not true.”¹²⁸

President Trump went even further, issuing highly personal attacks on courts and judges that ruled against him. Such rulings happened unusually often. During his first two years in office alone, lower federal judges ruled against the Trump administration at least 63 times.¹²⁹ In response, Trump dismissed adverse rulings—which came from both judges appointed by Republican presidents and by Democratic presidents—as “ridiculous,” a “disgrace,” and even “not law.” Using inflated rhetoric, Trump branded them a threat to national security and even appeared to challenge judicial independence (“I’ll tell you what,” he tweeted in response to a Ninth Circuit Court of Appeals ruling, “it’s not going to happen like this anymore”).¹³⁰

During the 2016 presidential campaign, Trump even questioned whether an Indiana-born judge who was presiding over a class-action suit against Trump University for fraud and breach of contract could be impartial because of his Mexican heritage. In racially tinged language, he complained at a public rally, “I have a Mexican judge” and described the judge as “a hater.” He even threatened retaliation when that judge ordered the release of documents outlining Trump University’s predatory marketing practices. “They ought to look into Judge Curiel,” he told a fired up crowd, “because what Judge Curiel is doing is a total disgrace.”¹³¹

When, as president, Trump disparaged an adverse ruling because it was decided by “an Obama judge,” Chief Justice John Roberts (appointed by George W. Bush) issued a statement saying: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is

something we should all be thankful for.” To this the president issued an extraordinary retort: “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country. . . . We need protection and security—these rulings are making our country unsafe! Very dangerous and unwise!”¹³²

Critics charged that President Trump’s attacks were undermining the independence of the judiciary. The Brennan Center for Justice went even further, saying that Trump was undermining “our entire system of government” because courts, as bulwarks of the law and our Constitution, “depend on the public to respect their judgments and on officials to obey and enforce their decisions.” “Separation of powers,” it added—which allows courts to enforce the rule of law—is not a threat to democracy; it is the essence of democracy.”¹³³

In addition to establishing general parameters of presidential power and reviewing presidential initiatives, Supreme Court decisions can have other significant repercussions on the fate of particular presidents. Two such decisions had a particular bearing on Bill Clinton. Had it not been for a 1988 ruling upholding (over the lone dissent of Antonin Scalia) the constitutionality of the independent counsel law and a unanimous 1997 ruling that allowed a sexual harassment lawsuit against the president by Paula Jones to proceed while he was still in office, Clinton might have been spared the independent counsel investigation by Kenneth Starr and the impeachment trial brought about as a result of the Monica Lewinsky scandal.¹³⁴

Conclusion: A Balancing Act

The relationship between the presidency and the judiciary can be described as a balancing act. The judiciary has the power to hand down rulings that have a direct effect on presidents and their policies, but presidents can influence the federal courts through the power to nominate judges to serve on them. Both have long-term consequences. Supreme Court rulings are not easy to overturn. Those based on the Constitution can be overruled only by the Court itself or through the passage of a constitutional amendment. The president’s power to appoint can also be far-reaching. Federal judges, unlike members of Congress and the political appointees of the executive branch, serve for life. That fact all but guarantees that judicial nominees will continue to be closely scrutinized and, in all likelihood, hotly contested.

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 50. Robert Scigliano, *The Supreme Court and the Presidency* (New York: Free Press, 1971), chap. 4.
 51. Joel B. Grossman and Stephen L. Wasby, “The Senate and Supreme Court Nominations: Some Reflections,” *Duke Law Journal* (August 1972): 559, n. 8.
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