

'Lame-Duck' Nominations to the Supreme Court

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'LAME-DUCK' NOMINATIONS TO THE SUPREME COURT

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Shortly after the death of Justice Antonin Scalia, Senator Charles Grassley cited a decades-old precedent in asserting that no replacement should be considered by his committee until a new president is sworn in next year. In this Court Report legal analyst [Kenneth Jost](#) examines the historical precedent for nominations to the Supreme Court late in a president's term.

The sudden and unexpected death of Justice Antonin Scalia on February 13 touched off a fierce political fight over how and when to fill the vacancy that he left on an ideologically divided Supreme Court. A Democratic president and the Republican-controlled Senate armed themselves with the Constitution and with history as they went into battle over choosing a successor to the stalwart conservative Scalia.

President Obama followed standard procedure in announcing the same day as Scalia's death that he would nominate a successor "in due time" with enough time for the Senate to act on the nomination. But leading Republican senators, including two running for the GOP presidential nomination, said the Senate should not act on any potential nomination. Instead, they argued, the selection should be left to Obama's successor, to be elected in November.

The Constitution specifies that the president "shall appoint" judges of the Supreme Court "by and with the advice and consent of the Senate." Out of 154 nominations through 2015, 30 failed to win the required majority approval in the Senate. Some failed on floor votes—most recently, Ronald Reagan's nominee Robert Bork in 1987. Other nominations were either withdrawn or postponed because of a lack of support in the Senate—most recently, George W. Bush's nomination of Harriet Miers in 2005.

Sen. Charles Grassley, the Iowa Republican and chairman of the Senate Judiciary Committee, called for delaying the nomination because of what he called "the standard practice over the last 80 years to not confirm Supreme Court nominees during a presidential election year." Without being specific, Grassley must have been thinking of Lyndon Johnson's failed nomination of Abe Fortas as chief justice in 1968, with Johnson a lame duck not seeking re-election. Senate Republicans blocked a vote on Fortas's nomination, opposing him because of ethics issues and his liberal views.

Democrats quickly pointed out, however, that Grassley was wrong in depicting a historical tradition of putting off Supreme Court nominations in presidential election years. Justice Anthony M. Kennedy was unanimously confirmed in February 1988, with Reagan in his final year in the White House. Earlier, President Franklin D. Roosevelt, a Democrat nearing the end of his second term, won easy approval for his nomination of Frank Murphy from a Democratic-controlled Senate in 1940.

With the discrepancy noted and political controversy swirling, Grassley appeared to change his stance on February 16 by indicating a willingness to hold a hearing on an Obama nominee but stopping short of promising a vote before the election. "This is a very serious position to fill," Grassley said on Radio Iowa, according to *The New York Times*, "and it should be filled and debated during the campaign and filled by either Hillary Clinton, Senator Sanders or whoever's nominated by the Republicans."

Nomination History

Going further back in time, some 19 nominees have won confirmation during a president's last year or so in a four-year term, including five appointed as chief justice. Buttressing the Republicans' view, however, some lame-duck presidents did fail in efforts to fill vacancies on the Court. John Tyler was forced to withdraw his nomination of Pennsylvania judge Edward King in 1844 because Senate Whigs hoped to hold the seat open for their presidential nominee, Henry Clay. And James Buchanan's nomination of his secretary of state, Jeremiah Black, failed in a 25-26 vote in the Senate in 1861, with Buchanan less than a month from yielding the presidency to Abraham Lincoln.

Clearly, the most important lame-duck nomination ever was John Adams' appointment of the great chief justice John Marshall in January 1801 with Adams' partisan opponent, Thomas Jefferson, two months from taking office. In 34 years on the bench, Marshall set the Supreme Court on a Federalist interpretation of the powers of the national government that survived mostly intact even after the states rights-minded Roger B. Taney succeeded him for the next 28 years. Andrew Jackson appointed Taney in December 1835; Taney won Senate confirmation in March 1836, as Jackson began the fourth year of his first presidential term.

Lincoln appointed his secretary of the treasury, Salmon P. Chase, as Taney's successor in December 1864, after the November election but before his formal re-election by the Electoral College in January 1865. Two decades later, Grover Cleveland nominated railroad lawyer Melville Fuller as chief justice in April 1888; in July Fuller won confirmation by a 41-20 vote. Cleveland lost the election later that year, but Fuller led the Court for 22 years, setting it on a conservative course that continued into the mid-1930s.

Other final-year presidential appointments to the Court have also been consequential even if less so. Woodrow Wilson nominated the consumer rights advocate Louis J. Brandeis in January 1916 to succeed the pro-business justice Lucius Q.C. Lamar; Brandeis, the first Jewish justice, won Senate confirmation on a 47-22 vote in an ideological battle tinged with anti-Semitism. Herbert Hoover nominated the respected New York judge Benjamin Cardozo in February 1932 to succeed the conservative Edward Sanford; Cardozo won confirmation without controversy only nine days later. He proved to be critical to the Court's ideological shift that first emerged in 1937. Hoover turned to Cardozo two years after his previous nominee, John Parker, went down to defeat in the Senate.

Reagan's selection of Kennedy, a respected moderate Republican judge, reflected a similar effort to gain widespread approval for a Supreme Court nominee after the bruising battle over Bork. Kennedy succeeded another Republican moderate, Lewis F. Powell Jr., who himself was nominated by Richard M. Nixon after Nixon had seen two conservative nominees rejected by the Democratic-controlled Senate: Clement Haynsworth Jr. and G. Harrold Carswell.

Partisan Fights

Supreme Court nominations became intensely partisan in the early years of the 21st century. Despite impressive credentials, John G. Roberts Jr.'s nomination as chief justice in 2005 drew 22 no votes – including one cast by Obama, then a junior senator from Illinois. Forty-two Democrats voted against confirming Samuel A. Alito Jr. in 2006; Obama's two nominees, Sonia Sotomayor and Elena Kagan, both drew more than 30 no votes from Republican senators (31 and 37 respectively).

With Republicans holding a 54-46 majority in 2016, Obama faces a daunting mathematical obstacle in appointing a confirmable nominee as Scalia's successor. Still, there is no exact historical precedent for a partisan Senate majority's keeping a Supreme Court seat unfilled for more than a year by flatly refusing to consider a president's nominee. With the battle only days old in mid-February, the outcome is all but impossible to predict.

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