



## **Frequently Asked Questions: Supreme Court Nominations & Confirmations**

**Background:** On Friday, September 18th, 2020, the Supreme Court announced the death of Associate Justice Ruth Bader Ginsburg. Shortly after, President Trump announced his intention to nominate a replacement for Justice Ginsburg. Despite the Left's rhetoric, the President has the constitutional power to nominate a replacement and have that nominee considered in the United States Senate. The President and Senate Majority Leader Mitch McConnell should move swiftly to nominate and confirm a new Justice to the Supreme Court bench. Here are some frequently asked questions and answers about the Supreme Court nomination and confirmation process.

### **Does President Trump have the authority to nominate a replacement for the Supreme Court?**

Yes. Article 2 Section 2 of the U.S. Constitution states, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counsuls, Judges of the supreme court..."

Regardless of the Left's demands to leave the seat vacant, President Trump is granted the power to nominate a replacement by the U.S. Constitution until the last day of his presidency. There have been 29 times in American history a Supreme Court vacancy has opened during a presidential election year. The President made a nomination in all 29 cases, including George Washington, who did it three times.

### **Does the Senate have the power to confirm President Trump's nominee to the Supreme Court?**

Yes, a simple majority of the Senate has the power to confirm a presidential nominee. For much of the Senate's history, a standing rule on judicial nominees required a 60-vote threshold to end debate and move to final confirmation, known as the judicial filibuster. In 2013 Senator Harry Reid and the Democrats changed the standing rule to allow a simple majority of the Senate to confirm most nominees, known as the nuclear option. Senate Republicans were right to extend that to Supreme Court nominees with the consideration of Neil Gorsuch. They should continue to exercise this rule.

### **What has changed since President Obama's nomination of Merrick Garland in 2016?**

There are two significant differences between President Trump and President Obama's nominations. President Obama's nomination came in the last year of his last term as president, making him and his choice unaccountable to the voters. In comparison, President Trump is in the last year of his first term and up for re-election, guaranteeing he is accountable to the people for the nominee he chooses.

President Obama's nomination also came while the Senate was controlled by the opposite party. The American people wanted a check on the liberal president and voted for a Senate majority that would oppose him during the 2014 election. Senate Majority Leader Mitch McConnell followed Senate precedent by not confirming a nominee under these circumstances. You would have to go back to President Grover Cleveland in 1888 to find the last example of the nominee for the president being confirmed by the opposite party in an election year.

### **What is the next step, and how long should the process take?**

President Trump is expected to announce his nominee in the coming days. The Senate Judiciary Committee will then consider the nominee by holding hearings to examine the individual's judicial qualifications, before recommending the nominee to the full Senate for a vote. As The Heritage Foundation's Thomas Jipping [highlighted](#), since 1969, six nominees have been confirmed in less than 45 days, three of which were in less than 30 days. This list also includes Justice Ginsburg, who was confirmed 43 days after being nominated by President Clinton. President Trump and Senate Republicans should move swiftly to nominate and confirm before the election.

### **Should the Senate skip the normal process of confirmation hearings in the Committee on the Judiciary?**

President Trump and Senate Republicans are well within the confines of the law, precedent, and the Constitution to nominate and consider the judicial record of any individual and they should continue to adhere to them. While we encourage the President and Senate Republicans to move forward with urgency, there is more than enough time to consider the qualifications of any nominee. It is important that the nominee's qualifications be vetted, and the committee hearing process is the appropriate place for that to occur. As we have discussed, a confirmation can occur in less than 20 days -- more than enough time before the election.

### **What about Democrat threats to pack the courts and get rid of legislative filibuster?**

The radical left and Senate Democrats have talked about ending the legislative filibuster, adding Senate seats from Washington, D.C. and Puerto Rico, and packing the courts for decades—[a position even Justice Ginsburg opposed](#). These threats should not deter President Trump and Senate Republicans, as there is a good chance the left will continue to pursue them regardless of the Supreme Court.