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*Speed of Presidential and Senate Actions on Supreme Court  
Nominations, 1900-2006*

R. Sam Garrett, Denis Steven Rutkus, and Curtis W. Copeland, Government and Finance Division

January 24, 2007

**Abstract.** This report provides information on the amount of time taken to act on all Supreme Court nominations occurring between 1900 and the present. It focuses on the actual amounts of time that Presidents and the Senate have taken to act (as opposed to the elapsed time between official points in the process). For example, rather than starting the nomination clock with the official notification of the President of a forthcoming vacancy (e.g., via receipt of a formal retirement letter), this report focuses on when the President first learned of a Justice's intention to leave the Court (e.g., via a private conversation with the outgoing Justice), or received word that a sitting Justice had died. Likewise, rather than starting the confirmation clock with the transmission of the official nomination to the Senate, this report focuses on when the Senate became aware of the President's selection (e.g., via a public announcement by the President).

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# Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2006

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**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

The speed with which appointments to the Supreme Court move through various stages in the nomination-and-confirmation process is often of great interest not only to all parties directly involved, but, as well, to the nation as a whole. Shortly after his October 31, 2005, nomination of Samuel A. Alito Jr. to fill the Associate Justice seat being vacated by Sandra Day O'Connor, President Bush called on the Senate to "act promptly on this important nomination so that an up or down vote is held before the end of this year." On November 3, 2005, Judiciary Committee Chairman Arlen Specter and Ranking Member Patrick Leahy announced that hearings on the Alito nomination would begin on January 9, 2006, with final Senate action scheduled for January 20, 2006. Judiciary Committee hearings on the Alito nomination began and concluded as scheduled. Although the schedule announced in November 2005 called for a committee vote on the nomination on January 17, the committee vote was postponed until January 24, 2006. The full Senate confirmed Judge Alito by a vote of 58-42 on January 31, 2006, making him the nation's 110<sup>th</sup> Supreme Court Justice.

This report provides information on the amount of time taken to act on all Supreme Court nominations occurring between 1900 and the present. It focuses on the *actual* amounts of time that Presidents and the Senate have taken to act (as opposed to the elapsed time between *official* points in the process). For example, rather than starting the nomination clock with the official notification of the President of a forthcoming vacancy (e.g., via receipt of a formal retirement letter), this report focuses on when the President first *learned* of a Justice's intention to leave the Court (e.g., via a private conversation with the outgoing Justice), or received word that a sitting Justice had died. Likewise, rather than starting the confirmation clock with the transmission of the official nomination to the Senate, this report focuses on when the Senate *became aware* of the President's selection (e.g., via a public announcement by the President).

The data indicate that the entire nomination-and-confirmation process (from when the President first learned of a vacancy to final Senate action) has generally taken almost twice as long for nominees after 1980 than for nominees in the previous 80 years. From 1900 to 1980, the entire process took a median of 59 days; from 1981 through 2006, the process took a median of 113 days. Although Presidents after 1980 have moved more quickly than their predecessors in announcing nominees after learning of vacancies (a median of 12 days compared with 34 days before 1980), the Senate portion of the process (i.e., from the nomination announcement to final Senate action) now appears to take much longer than before (a median of 84 days from 1981 through 2006, compared with 17 days from 1900 through 1980). Most notably, the amount of time between the nomination announcement and first Judiciary Committee hearing has more than tripled—from a median of 12.5 days (1900-1980) to 52 days.

This report will be updated as additional historical information becomes available or another Supreme Court vacancy is announced.

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## Introduction

The nomination and confirmation of a Chief Justice or an Associate Justice to the U.S. Supreme Court is an infrequent event of major significance in American public life. To receive what may be lifetime appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate. Midway in the appointment process, intensive hearings on a Supreme Court nomination, often taking at least three or four days, are routinely held by the Senate Judiciary Committee, which then can vote on whether to report the nomination to the Senate with a favorable recommendation.

Nominating and confirming Supreme Court Justices is an interdependent process. Neither the President nor the Senate acts alone. The decisions that each branch makes determine how quickly nominations are made and considered, and whether the nomination is successful. This report provides information on the pace of all Supreme Court nominations and confirmations since 1900, focusing on the *actual* amounts of time that Presidents and the Senate have taken to act (as opposed to the elapsed time between *official* points in the process). Events during 2005 and early 2006 underscored concerns about the speed with which the President makes Supreme Court nominations and the Senate acts on those nominations.<sup>1</sup>

## Recent Nominations

Late 2005 and early 2006 marked a period of transition among Supreme Court Justices. Associate Justice Sandra Day O'Connor's July 2005 retirement announcement marked the first pending Court vacancy since 1994. Within a few months, however, the Senate considered three nominations. As is discussed below, Judge John G. Roberts was initially nominated to replace O'Connor, but that nomination was withdrawn when Chief Justice William H. Rehnquist died in early September. The Roberts nomination was withdrawn and re-submitted for the Chief Justice vacancy. The Senate confirmed Roberts in September 2005. Then-White House Counsel Harriet Miers was initially nominated to fill the again-pending O'Connor vacancy, but the Miers nomination was eventually withdrawn. Judge Samuel Alito was confirmed to the O'Connor seat in January 2006.

As is noted throughout this report, media accounts and other research suggest that when these and other Court vacancies arise, the President, members of the Senate, and their staffs, can begin work on nominations immediately, even if official nominations are days or weeks away. Particularly when multiple vacancies occur in close succession or simultaneously, as they did in 2005, the President and the Senate might have different preferences about how quickly new nominees should be considered. Until 1980, the President often took longer to announce a nominee than the Senate did to take final action on nominees. By contrast, since 1981, Presidents have been quicker to announce nominations than the Senate has been to confirm or reject those nominations. The President and members of the Senate (especially the Judiciary Committee) each proposed their own timetables regarding the Roberts, Miers, and Alito nominations. The following discussion provides additional details.

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<sup>1</sup> For a discussion of *official* actions for all Supreme Court nominations since 1789, see CRS Report RL33225, *Supreme Court Nominations, 1789 - 2006: Actions by the Senate, the Judiciary Committee, and the President*, by Denis Steven Rutkus and Maureen Bearden.

## The Roberts Nomination

On July 1, 2005, Associate Justice Sandra Day O'Connor surprised many in official Washington, and possibly President George W. Bush, with a one-paragraph letter announcing her retirement from the Supreme Court, effective upon the confirmation of her successor.<sup>2</sup> Her announcement created the first vacancy on the Court in 11 years. The Court had just concluded its 2004-2005 term, and the opening session of the Court's next term, on October 3, 2005, was three months away. Finding a new Associate Justice took on added urgency, given the failing health of then-Chief Justice William H. Rehnquist. Departure of the Chief Justice as well as Justice O'Connor could result in the need for two Court appointments, and create the possibility of at least one vacancy on the Court when it reconvened in October—unless the new appointments were made expeditiously.

Hours after Justice O'Connor announced her retirement, a senior aide to Senate Majority Leader Bill Frist told reporters that, "Our goal is to have the court back at full strength by the first Monday in October." Senate Judiciary Committee staff were reportedly "poised to begin reviewing background materials" on potential nominees.<sup>3</sup> Nevertheless, appointment of a new Justice in time for the Court's opening session seemed like a challenging goal. In recent years, the Senate Judiciary Committee, and the full Senate as well, had been embroiled in controversies over some of the President's nominations to the lower federal courts. Continued controversy seemed likely surrounding any future nominations to the Supreme Court.

On July 19, 2005, 18 days after receiving Justice O'Connor's retirement letter, President Bush announced his selection of John G. Roberts, Jr., a federal appellate judge, to be the next Associate Justice. Ten days later, on July 29, the President formally nominated Judge Roberts to the Court, with the nomination document immediately transmitted to the Senate, where it was referred to the Senate Judiciary Committee. Hearings on this nomination were scheduled to begin September 6, but those hearings would never take place.

When Chief Justice William H. Rehnquist died on September 3, Judge Roberts became the first Supreme Court nominee to be withdrawn by the President for one seat on the Court and re-nominated for another. The Senate Judiciary Committee quickly cancelled its Associate Justice hearings, and began Roberts's Chief Justice hearings on September 12, 2005. After receiving a favorable 13-5 vote by the Judiciary Committee on September 22, the nomination of Judge Roberts to be Chief Justice was confirmed by the Senate on the morning of September 29, 2005, by a 78-22 vote. Later that day, the confirmed nominee took both his constitutional and judicial oaths of office at the White House.<sup>4</sup>

Due to the speed with which Judge Roberts was nominated to be Chief Justice and considered by the Senate Judiciary Committee and the full Senate, his appointment was completed in time for the Court to be at full strength at the start of its 2005-2006 term. With the start of that term,

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<sup>2</sup> Justice O'Connor's retirement letter is available at <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>.

<sup>3</sup> "Senate GOP Leaders Seek Quick Action on Nominee to Replace Justice O'Connor," *Daily Report for Executives*, July 5, 2005, p. A-33.

<sup>4</sup> The judicial oath is required by the Judiciary Act of 1789, and the constitutional oath (which is administered to Members of Congress and all executive and judicial officers) is required by Article VI of the Constitution of the United States.

Justice O'Connor remained on the Court, in keeping with the intention stated in her retirement letter of stepping down only upon the confirmation of her successor. For his part, President Bush had declined to name a replacement for John Roberts to succeed Sandra Day O'Connor prior to the Senate vote on September 29 confirming Judge Roberts as Chief Justice.

## The Miers Nomination

On October 3, 2005, President Bush announced his nomination of White House Counsel Harriet E. Miers to succeed Sandra Day O'Connor as Associate Justice on the Supreme Court. The President said that the Senate had shown during the confirmation of Chief Justice Roberts that it could act promptly, and called upon the Senate to "review [Miers's] qualifications thoroughly and fairly and to vote on her nomination promptly."<sup>5</sup> At a press conference the next day, the President said that he expected the Senate "to hold an up-or-down vote on Harriet's nomination by Thanksgiving" (i.e., by November 24, 2005).<sup>6</sup> Similarly, Senate Majority Leader Bill Frist called on his colleagues to move "expeditiously but carefully," and encouraged a floor vote "by Thanksgiving."<sup>7</sup> Several news reports suggested that confirmation hearings could begin as early as November 7, 2005. Senator Arlen Specter, Chairman of the Senate Judiciary Committee, reportedly told reporters that he hoped the committee would complete hearings by Thanksgiving,<sup>8</sup> but also reportedly emphasized that "thoroughness will be the objective," as opposed to meeting a particular timetable.<sup>9</sup> He also reportedly said that the timing of hearings on the nomination would in part be up to Miers, who would have to study "so that she would have the grasp of these very complex decisions."<sup>10</sup>

On October 27, 2005, Miers delivered a letter to the President withdrawing her nomination as Associate Justice, and the President "reluctantly accepted" her withdrawal.<sup>11</sup> Both Miers and the President indicated that the action was precipitated by the Senate's request for documents about her service in the White House. However, others suggested that other factors may have been involved.<sup>12</sup> In his statement accepting the withdrawal, the President said that he expected to fill the vacancy "in a timely manner."

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<sup>5</sup> See <http://www.whitehouse.gov/news/releases/2005/10/20051003.html> for the President's nomination statement and Miers's remarks.

<sup>6</sup> See <http://www.whitehouse.gov/news/releases/2005/10/20051004-1.html> for the text of this press conference.

<sup>7</sup> See [http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech\\_id=293](http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech_id=293) for a copy of Senator Frist's statement.

<sup>8</sup> Kimberly Heffling, "Specter Decries Bush 'Pummeling' on Miers," *Washington Post*, Oct. 11, 2005

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/11/AR2005101101310.html>.

<sup>9</sup> John Stanton, "Leaders Seeking To Place Miers On Court By Thanksgiving," *CongressDailyPM*, Oct. 3, 2005.

<sup>10</sup> Sheryl Gay Stolberg, "Some Liberals and Conservatives Find Themselves in Awkward Spots," *New York Times*, Oct. 4, 2005, p. A23.

<sup>11</sup> For a copy of the President's statement, see <http://www.whitehouse.gov/news/releases/2005/10/20051027-2.html>.

<sup>12</sup> For example, former Senator Daniel R. Coats, who shepherded Miers in the Senate, said "It was not all about the documents. It was a cumulation of things." See Keith Perine and Seth Stern, "Bush Faces Dilemma With New Pick," *CQ Today*, Oct. 27, 2005. See <http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/news/109/news109-000001936032.html@allnews&metapub=CQ-NEWS&searchIndex=0&seqNum=1>.



## The Alito Nomination

Four days after Harriet Miers's withdrawal, on October 31, 2005, President George W. Bush announced his nomination of Samuel A. Alito, Jr., a judge on the U.S. Court of Appeals for the Third Circuit, to replace Justice O'Connor. President Bush called on the Senate to "act promptly on this important nomination so that an up or down vote is held before the end of this year."<sup>13</sup> Senate Majority Leader Bill Frist also predicted a relatively quick timetable for Senate consideration,<sup>14</sup> but other Senators, including Minority Leader Harry Reid, suggested that Senate consideration of the nomination could last into the new year.<sup>15</sup>

On November 3, 2005, Senate Judiciary Committee Chairman Arlen Specter and Ranking Minority Member Patrick Leahy announced that confirmation hearings on Judge Alito's nomination would not begin until January 9, 2006, with a vote by the committee scheduled for January 17, 2006, after five days of hearings. They said that the full Senate would vote on the nomination on January 20, 2006.<sup>16</sup> Judiciary Committee hearings on the Alito nomination began and concluded as scheduled, although a targeted January 17 committee vote was postponed until January 24, 2006. A final floor vote was anticipated before President George W. Bush's January 31, 2006, State of the Union address.<sup>17</sup> After Senators Specter and Leahy reportedly reached agreement on the revised committee schedule over the January 14-16 weekend, Majority Leader Bill Frist announced that "as soon as the Judiciary Committee reports the nomination, the full Senate will begin debate on Judge Alito the next day and move swiftly to a fair up-or-down vote."<sup>18</sup> Voting mainly along party lines (10-8), the Senate Judiciary Committee reported Alito's nomination to the full Senate on January 24, which confirmed Alito (58-42) on January 31, 2006.

## Measuring the Pace of Supreme Court Appointments

For many Supreme Court appointments, the timing of individual events is determined by the decisions of various key players—by sitting Justices planning to leave the Court; by the President, who selects nominees to fill Court vacancies; and by Senate committee and party leaders, who respectively schedule committee and floor action on Supreme Court nominations. First, Justices who retire or resign from the Court must decide whether to provide the President

<sup>13</sup> For President George W. Bush's nomination remarks and Judge Alito's response, see <http://www.whitehouse.gov/news/releases/2005/10/print/20051031.html>.

<sup>14</sup> For a copy of Senator Frist's press release, see [http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=2144&Month=10&Year=2005](http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=2144&Month=10&Year=2005).

<sup>15</sup> See The Associated Press, "Reaction to the Alito Nomination," *Washington Post*, Oct. 31, 2005, available at [http://www.nexis.com/research/home?key=1130786095&\\_session=9eef720a-4a42-11da-9394-00008a0c593e.1.3308238895.296188.%20.0.0&\\_state=&wchp=dGLbVtb-zSkBl&\\_md5=93f06c0fe1c37fbd5b4c52fe4519bbbb](http://www.nexis.com/research/home?key=1130786095&_session=9eef720a-4a42-11da-9394-00008a0c593e.1.3308238895.296188.%20.0.0&_state=&wchp=dGLbVtb-zSkBl&_md5=93f06c0fe1c37fbd5b4c52fe4519bbbb).

<sup>16</sup> See "Senate Judiciary Will Begin Alito Hearings Jan. 9, Vote Jan. 17; Floor Vote Set Jan. 20," *Daily Report for Executives*, Nov. 4, 2005, available at <http://ippubs.bna.com/ip/BNA/DER.NSF/9311bd429c19a79485256b57005ace13/819c3d1e4ca734da852570af0010aeaf?OpenDocument>]. For a transcript of Senators Specter and Leahy's remarks, see <http://www.cq.com/display.do?docid=1948157>.

<sup>17</sup> Amy Goldstein, "Senate Panel's Vote on Alito Delayed Until Next Week," *Washington Post*, Jan. 17, 2006, p. A3.

<sup>18</sup> For a copy of Senator Frist's Jan. 16, 2006, press release, see [http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=2221&Month=1&Year=2006](http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=2221&Month=1&Year=2006).

with advance notice of that decision. For example, Justice Harry A. Blackmun told President William J. Clinton of his decision to retire in 1994, more than four months before the decision became public on April 6 of that year.<sup>19</sup> Justice O'Connor, on the other hand, did not appear to have given President George W. Bush any advance notice when she resigned on July 1, 2005. Also, the mode of presidential notification varies. While President Clinton learned of Justice Blackmun's plans to retire through an informal conversation, Justice O'Connor apparently notified President Bush of her decision through a formal letter.

Once the President chooses a nominee, he alerts the Senate—by public announcement as well as by formal transmission of a written nomination to the Senate. Frequently, the President will announce and formally nominate his Supreme Court choice on the same day, or take both actions within a few days of each other. Less commonly, Presidents announce their intention to nominate a candidate, then make the official nomination a week or more later. The most extreme case of the latter involved President Ronald Reagan in 1981. On July 7 of that year, President Reagan announced he would send the nomination of Sandra Day O'Connor, then an Arizona state appeals court judge, to the Senate “upon completion of all the necessary checks by the Federal Bureau of Investigation.”<sup>20</sup> However, it was not until almost six weeks later, on August 19, that Judge O'Connor was officially nominated.<sup>21</sup> As noted above, after the Senate receives a Supreme Court nomination, the Judiciary Committee normally holds hearings, followed by final committee action, and consideration before the full chamber.

## Official and Unofficial Timetables

The measurement of how long the President and the Senate take to execute their *official* duties surrounding Supreme Court nominations necessarily focuses on official dates of action taken. The most important of these action dates include those on which (1) an outgoing Justice officially informs the President of the intention to step down from the Court (or, alternatively, the date on which a Court seat is vacated due to the death of a Justice), (2) a President formally nominates someone to the Court, the Senate receives the President's nomination, and the nomination is referred to the Senate Judiciary Committee (almost always all on the same date),<sup>22</sup> (3) the Senate Judiciary Committee holds hearings on the nomination, (4) the committee votes on the nomination, and (5) the Senate votes on whether to confirm, or chooses to take no action.

In addition to these dates, however, the President and the Senate usually consider Supreme Court nominations outside official timetables. Just as the President can begin considering a new nominee as soon as he knows a vacancy will arise, the Senate can begin preparing to consider a nominee as soon as the President announces his choice, even if the receipt of the formal nomination is still days or weeks away. Fundamentally, nominations and confirmations to the Supreme Court involve both formal and informal decisions. While formal decisions are easily

<sup>19</sup> U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1993*, vol. 1 (Washington: GPO, 1994), p. 597.

<sup>20</sup> U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1981* (Washington: GPO, 1982), p. 596.

<sup>21</sup> U. S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, 97<sup>th</sup> Cong., 1<sup>st</sup> sess., Aug. 19, 1981 (Washington: GPO, 1982), p. 644.

<sup>22</sup> Although these three events usually occur on the same day, a nomination sometimes, on rare occasions, is received by the Senate on a day after it was signed by the President, or is referred to the Judiciary Committee on a day after its receipt by the Senate.

accessible in historical records, informal decisions—sparsely mentioned in the formal record, or not mentioned at all—might, in many cases, provide better insight into how long the process truly takes.

## Objectives of This Report

This report explores the speed of presidential and Senate decision-making surrounding nominations to the Supreme Court from 1900 to the present. During this period, there were a total of 60 vacancies and 66 nominees to the Court.<sup>23</sup> The analysis concentrates on the period 1900-2006 for two primary reasons: (1) relevant historical data for this period are much more readily available and reliable than for earlier Court appointments,<sup>24</sup> and (2) public confirmation hearings for Supreme Court nominations before the Senate Judiciary Committee—an important phase in the Supreme Court appointment process, and one of particular interest to this report—were unheard of before the 20<sup>th</sup> century.<sup>25</sup>

Although research on Supreme Court nominations often focuses on either presidential or Senate decision-making, this analysis considers the time *both* institutions take to make decisions about, and act on, nominees. The report also takes a unique approach in discussing—as well as can be determined—how long Presidents *actually* take to decide who their nominees will be, and how long the Senate *actually* takes to act on nominations. For example, rather than starting the nomination clock with the official notification of the President of a forthcoming vacancy (e.g., the receipt of a formal retirement letter), this analysis focuses on when the President first *learned* of the vacancy (e.g., a private conversation with the outgoing Justice). Likewise, rather than starting the confirmation clock with the transmission the official nomination to the Senate, this analysis focuses on when the Senate became aware of the President’s selection (e.g., by a public announcement by the President).

In many cases, establishing precisely when a President knew that he would have the opportunity to make a Supreme Court nomination is impossible. Such information might never have been recorded or known by anyone except the President and his inner circle. However, historical research reveals several instances when a President had advance knowledge of an impending vacancy, well before the public announcement of a Justice’s intention to leave the Court. Data sources used to determine when Presidents first knew of vacancies included historical newspapers, official documents such as public presidential papers (which contain Justices’ retirement letters to various Presidents), and CRS consultations with presidential libraries.<sup>26</sup> Dates

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<sup>23</sup> For an analysis of all unsuccessful Supreme Court nominees, see CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2006*, by Henry B. Hogue. In addition to the unsuccessful nominations listed in that report for the 1900-2006 period, the present report includes Judge Douglas H. Ginsburg as a an unsuccessful “nominee” since one part of the report’s focus is on presidential announcements of nominees. President Reagan announced his *intention* to nominate Judge Ginsburg in 1987, but Ginsburg withdrew his name from consideration before being officially nominated. The Ginsburg case is briefly discussed later in this report.

<sup>24</sup> This particularly is the case for coverage of Supreme Court appointments in on-line full-text historical newspapers, where coverage, as might be expected, typically is found to be less comprehensive regarding the procedures of Supreme Court appointments farther back into the 19<sup>th</sup> century.

<sup>25</sup> The earliest Supreme Court confirmation hearings held in open session were those in 1916 for the nomination of Louis D. Brandeis to be an Associate Justice. See CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

<sup>26</sup> CRS Knowledge Services Group Information Research Specialist Dana Ely, Karen Anson (Franklin D. Roosevelt Library), Valoise Armstrong (Eisenhower Library), Joshua Cochran (Ford Library), Jennifer Evans (Nixon Presidential Library) (continued...)

cited throughout this report and in **Table 1**, **Table 2**, and **Table 3**, at the end of the report, are based on that research.

## How Supreme Court Vacancies Occur

The need for a new appointment to the Court arises when a Justice position becomes vacant, due to death, retirement, or resignation, or when a Justice announces his intention to retire or resign. If the vacated seat is that of the Chief Justice, the President, if he chooses, may nominate a sitting Associate Justice to be Chief, thus setting the stage for the creation of an Associate Justice vacancy as well. Vacancies on the Court also will occur if Justices resign to receive new government appointments or to seek new government positions. When a nomination fails in the Senate, the President must select a new nominee (unless the President chooses to re-nominate his first choice).

### Death of a Sitting Justice

Supreme Court Justices receive what may be lifetime appointments, “good Behaviour” being the only constitutionally specified requirement for continued service.<sup>27</sup> Lifetime tenure, interesting work, and the prestige of the office result in Justices often choosing to serve as long as possible. Historically, a number of Justices have died in office. Most recently, Chief Justice William H. Rehnquist died on September 3, 2005, after battling thyroid cancer for almost a year. Death in office was common on the Court during the first half of the 20<sup>th</sup> century—14 of 34 vacancies between 1900-1950. In fact, all five Court vacancies occurring between 1946 and 1954 were due to death of a sitting Justice (see **Table 1**). Of the 23 vacancies since 1954, though, no Justice had died while still on the Court until Chief Justice Rehnquist in 2005.

### Retirement or Resignation of a Sitting Justice

Since 1954, retirement has been by far the most common way in which Justices have left the bench (19 of 23 vacancies occurring after 1954 resulted from retirements). Resignation (i.e., leaving the bench before becoming eligible for retirement compensation) is rare.<sup>28</sup> In recent

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(...continued)

Materials), Sharon Kelly (Kennedy Library), Matthew Schaefer (Hoover Library), Randy Sowell (Truman Library), Jennifer Sternaman (Reagan Library), Deborah Wheeler (George Bush Library), and Adam C. Bergfeld (Clinton Library) provided consultations on this portion of the project.

<sup>27</sup> U.S. Constitution, Article III, Section 1.

<sup>28</sup> Under 28 U.S.C. §371, Supreme Court Justices, like other Article III (tenure “during good Behaviour”) federal judges, may *retire*, and be entitled to receive retirement compensation, in one of two ways—either by taking “senior status” or by “retiring from office.” Beginning at age 65, they are entitled to receive retirement compensation, if having served a minimum 10 years as an Article III judge, their age and overall Article III judicial experience totals 80 years. (Hence, under this “Rule of 80,” a Justice of age 65 must have served 15 years to become eligible for retirement compensation; a Justice of age 66, 14 years; a Justice of age 67, 13 years; etc.) Judges who take senior status retire from regular active service but retain their judicial office and the salary of the office, subject to annual certification of their having performed certain judicial or administrative duties in the preceding year. Judges who retire from office completely relinquish their judicial office with the right to a frozen lifetime annuity equal to the salary of the office at the time of retirement. In contrast, a Justice’s *resignation* entails voluntarily relinquishing his or her judicial office without meeting the age and service requirements of the Rule of 80 (and thus being ineligible to receive retirement compensation). See U.S. Administrative Office of the United States Courts, *Senior Status and Retirement for Article III* (continued...)

history, two Justices have resigned from the Court. Justice Arthur Goldberg resigned in 1965 to assume the post of U.S. Ambassador to the United Nations.<sup>29</sup> Justice Abe Fortas resigned in 1969 after protracted criticism over controversial consulting work while on the bench and a failed nomination to be elevated from Associate Justice to Chief Justice.<sup>30</sup> When Justices retire or resign, the President is usually notified by formal letter. As noted previously, there is evidence in a few cases that a President informally learned of a forthcoming retirement in advance.

Pursuant to a law enacted in 1939, a Justice (or any other federal judge receiving lifetime appointment) may also retire if “unable because of permanent disability to perform the duties of his office,” by furnishing the President a certificate of disability.<sup>31</sup> Prior to 1939, specific legislation from Congress was required to provide retirement benefits to a Justice departing the Court because of disability who otherwise would be ineligible for such benefits, due to insufficient age and length of service. In such circumstances in 1910, for instance, Congress took legislative action granting a pension to Justice William H. Moody. As the *Washington Post* reported at the time, although illness had kept Justice Moody from the bench for “almost a year,” he was not yet eligible for retirement.<sup>32</sup>

## **Nomination of a Sitting Justice to Another Position**

When a Chief Justice vacancy arises, the President may choose to nominate a sitting Associate Justice for the Court’s top post. If the Chief Justice nominee is confirmed, he or she must, to assume the new position, resign as Associate Justice, requiring a new nominee from the President to fill the newly vacated Associate Justice seat. However, this scenario is relatively rare. During the 1900-2006 period, Presidents attempted to elevate Associate Justices to Chief Justice four times, with the Senate confirming three nominees. Most recently, in 1986, President Ronald Reagan nominated then-Associate Justice William H. Rehnquist to be Chief Justice.<sup>33</sup>

Presidents may also nominate sitting Justices to other political posts, which (if accepted) require resignation from the Court. Between 1900 and 2006, three Justices resigned to pursue other formal public service. In 1916, Justice Charles Evans Hughes resigned to pursue the Republican nomination for President.<sup>34</sup> Justice James F. Byrnes resigned on October 3, 1942, becoming

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(...continued)

*Judges*, Apr. 1999 (Judges Information Series, No. 4), pp. vii-viii.

<sup>29</sup> Carroll Kilpatrick, “Goldberg is Named to Stevenson Post,” *Washington Post*, July 21, 1965, p. A1.

<sup>30</sup> On the controversies surrounding Justice Fortas’s nomination and resignation, see Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State University of New York Press, 2003), pp. 171-175; and Philip Warden and Aldo Beckman, “Fortas Agrees to Quit, Nixon Aide Says,” *Chicago Tribune*, May 15, 1969, p. 7.

<sup>31</sup> The law provides that a Justice retiring under these provisions shall receive for the remainder of his lifetime “the salary he is receiving at the date of retirement” or, if his service was less than ten years, one-half of that salary. Act of August 5, 1939, ch. 433, 53 Stat. 1204-1205; 28 U.S.C. §372(a).

<sup>32</sup> “Moody Will Retire,” *Washington Post*, June 15, 1910, p. 1.

<sup>33</sup> The other Associate Justices nominated for Chief Justice during the period were: Edward D. White (1910), Harlan F. Stone (1941), and Abe Fortas (1968). As noted previously, Justice Fortas’s nomination failed to receive Senate confirmation.

<sup>34</sup> “Hughes, With Words That Ring, Obeys Call to Lead Republicans,” *Washington Post*, June 11, 1916, p. 1.

Director of Economic Stability for President Franklin D. Roosevelt.<sup>35</sup> As noted previously, Justice Arthur Goldberg resigned in 1965 to become the U.N. Ambassador.

## Controversial, Withdrawn, and Rejected Nominations

When any Court nomination (whether for an Associate or Chief Justice seat) fails in the Senate, the President may either re-submit the nomination or choose another candidate to fill the bench. The entire process thus begins anew. Withdrawals and rejections can greatly increase the amount of time taken to confirm Justices to the Court. Controversial nominees who are eventually confirmed also usually take more time to consider. The late 1960s and early 1970s were one of the most tumultuous periods of nominations and rejections in the Court's history. On May 14, 1969, Justice Abe Fortas resigned from the bench. Fortas had been embroiled in a scandal surrounding his consulting income, and failed to win confirmation as Chief Justice when President Johnson nominated him to the seat in 1968.<sup>36</sup> Previously, on October 14, 1968, President Johnson had withdrawn the Fortas nomination as well as the nomination of Homer Thornberry to fill the vacancy that would have been created by Fortas's elevation. The Senate rejected President Richard M. Nixon's first two nominees to the Fortas seat—Clement F. Haynsworth, Jr. and G. Harrold Carswell.<sup>37</sup> President Nixon's third choice, Harry A. Blackmun, was not confirmed until May 12, 1970—almost a year after Fortas's resignation.

## Data Presentation

**Table 1** (at the end of this report) lists dates for the following events regarding each nomination to the Supreme Court since 1900: (1) when the actual or prospective vacancy apparently became known to the President, (2) when the President announced the nominee, (3) when the Senate Judiciary Committee held its first hearing on the nominee, (4) when final committee action took place, and (5) when final Senate action took place. **Table 2** presents the number of days elapsed for six related time intervals: (1) from when the President apparently learned of the actual or prospective vacancy to the his announcement of a new nominee, (2) from the nomination announcement to the first Judiciary Committee hearing, (3) from the first hearing to the committee's final action, (4) from the committee's final action to the Senate's final action, (5) from nomination announcement to final Senate action (duration of total Senate action), and (6) from the vacancy starting date (when the President apparently first became aware of the opportunity to make a nomination) to final Senate action. **Table 3** provides summary statistics for the number of days elapsed during each of these intervals, for all nominations from 1900 until 2006, and for two periods within those dates—1900-1980 and 1981-2006.<sup>38</sup> As discussed later in

<sup>35</sup> Associated Press, "Byrnes Resigns From Bench in Letter to President," *New York Times*, Oct. 4, 1942, p. 45.

<sup>36</sup> On the controversies surrounding Justice Fortas's nomination and resignation, see Ward, *Deciding to Leave*, pp. 171-175; and Philip Warden and Aldo Beckman, "Fortas Agrees to Quit, Nixon Aide Says," *Chicago Tribune*, May 15, 1969, p. 7.

<sup>37</sup> Haynsworth and Carswell were both rejected due to Senate doubts about their personal views and professional qualifications. For a summary of these and other cases of rejected Supreme Court nominees, see CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2006*, by Henry B. Hogue.

<sup>38</sup> In **Table 3**, the median amount of time from vacancy to final Senate action within each time period does not necessarily equal the sum of the medians for each stage in the nomination-and-confirmation process. Likewise, the median lengths of time for all Senate actions (i.e., from nomination announcement to final Senate action) within each time period do not equal the sum of the medians for each stage. The median identifies the mid-point for individual sets (continued...)

this report, those periods were chosen because the data indicate a sharp difference in the pace of most nominations before and after 1980.

## Date of Actual or Prospective Vacancy

As noted previously, it is often difficult or impossible to determine the specific date that a President first knew he would have the opportunity to name a new Justice to the Supreme Court. The President always has the constitutional obligation to make nominations to the Court when vacancies arise, and is certainly aware of the possibility that vacancies could arise at any time. However, the “Actual or Prospective Vacancy Became Known to President” columns in **Table 1** and **Table 2** focus on documented, specific instances when the President knew he had, or soon would have, the opportunity to name a new Justice to the Court.<sup>39</sup> These dates are based on extensive research about when the Justice’s impending departure (or death) was made public, and whether the President had advance knowledge of the vacancy before it became public. In cases in which research revealed no public evidence that the President had advance notice (or in which the data are inconclusive), the date of the first public account of the vacancy marks the beginning of the process (the “When” column in **Table 1** and **Table 2**).<sup>40</sup>

For example, Justice Sandra Day O’Connor announced her retirement, pending confirmation of a successor, on July 1, 2005. There is no evidence that President George W. Bush definitely knew that O’Connor would retire until her announcement. Therefore, July 1, 2005, is used as the starting point for what became the John G. Roberts Associate Justice nomination.<sup>41</sup> On the other hand, although Chief Justice Warren Burger’s retirement letter to Ronald Reagan was not released until June 17, 1986, President Reagan’s public papers reveal that Burger informed the President of his decision to retire on May 27, 1986.<sup>42</sup> Therefore, May 27, 1986, is used as the starting point

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(...continued)

of observations. Because each stage of the process can have a different number of observations, and because the data are also not a “normal” (i.e., “bell-shaped”) distribution, the sum of the medians for individual stages generally is not equal to the median for the entire period. For more information, see chapter 4 in Ya-lun Chou, *Statistical Analysis for Business and Economics* (New York: Elsevier, 1989).

<sup>39</sup> In **Table 1** and **Table 2**, actual vacancies are those that already have been announced or occurred (i.e., a sitting Justice announces a retirement date or dies). Prospective vacancies, for the purposes of this report, are not merely speculative. They require firm notice, either through notification from a sitting Justice or major media accounts, that a Justice will leave the Court imminently, even if an exact date is not specified.

<sup>40</sup> This report, it should be re-emphasized, bases the starting point at when Presidents apparently learned of actual or prospective Court vacancies. These dates are based on published information or information obtained from presidential archives. Readers should be alerted, as a caveat, that there might well have been instances, unreported at the time as well as still unknown to present-day scholars, in which various Presidents privately were alerted of upcoming Court vacancies or had reasons to believe that vacancies were imminent in advance of the starting dates listed in this report. To the extent that such instances are unaccounted for, the full extent of time during which such Presidents were aware of prospective Court vacancies and were able to consider future Court candidates before publicly announcing their choices, is under-measured in this report.

<sup>41</sup> As noted elsewhere in this report, President George W. Bush withdrew Roberts’s nomination as Associate Justice on Sept. 5, 2005.

<sup>42</sup> President Reagan had a private conversation with Chief Justice Burger on May 27, 1986, when Burger alerted the President to his impending retirement (“Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist To Be Chief Justice and Antonin Scalia To Be an Associate Justice,” U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1986*, vol. 2 (Washington: GPO, 1989) p. 781).

for what became the William H. Rehnquist elevation to Chief Justice. Notes throughout **Table 1** and **Table 2** provide information on historical context.

## Announcement-of-Nominee Date

Unless otherwise noted, the “President’s Announcement-of-Nominee” date in **Table 1** is the day when the President announced his nomination to the public or released the text of his nomination letter (whichever came first). This date is significant because it marks the Senate’s first opportunity to begin considering the nomination, even if informally. There are a few cases, explained by table notes, in which Presidents announced their decisions less formally, but still publicly. For example, President Harry S. Truman casually told reporters during a July 28, 1949, press conference that he had offered an Associate Justice nomination to then-Attorney General Thomas C. Clark, even though Clark had not yet accepted the nomination.<sup>43</sup> As discussed previously, in some cases, the announcement date differs by days or even weeks from the date the nomination was formally submitted to the Senate.

## Use of Medians to Summarize Intervals

**Table 2** provides the duration of each major interval in the process of nominating and considering Supreme Court Justices.<sup>44</sup> **Table 3** provides the *median* number of days for each major interval in the process. The median is the middle number in a set of observations (in this case, the number of days involved in each stage of considering Supreme Court nominations). The median is generally the preferred measure of central tendency in social science research.<sup>45</sup> As statistician William H. Greene notes, “Loosely speaking, the median corresponds more closely than the mean to the middle of a distribution [group of numbers]. It is unaffected by extreme values.”<sup>46</sup> In other words, the median represents the best example of the “average” case, regardless of extremely short or long individual confirmations.

However, in describing the speed of the Supreme Court nomination-and-confirmation process, even median values should be considered carefully. Each nomination is different, and political context and historical factors can have a major impact on when various events occur. Several factors affecting individual nominations to the Court are discussed later in this report.

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<sup>43</sup> President Truman did not announce that Clark had accepted the nomination until Aug. 1, 1949 (Edward T. Folliard, “Clark Accepts High Court Proffer,” *Washington Post*, Aug. 2, 1949), p. 1.

<sup>44</sup> When calculating durations, the date on which the final event occurs is not counted as a full day. For example, if committee hearings began on July 12 and the committee took its final action on July 13, the duration is one day, not two. For cases in which durations are less than one day (i.e., the committee final action and final Senate vote took place on the same day), the duration is listed as 0 days.

<sup>45</sup> Although the arithmetic mean (the sum of all observations divided by the number of observations) is the true “average” number, it has the disadvantage of being skewed by extremely high or low values. For an introduction to median versus mean and arguments surrounding when each should be used, see chapter 3 in Alan Agresti and Barbara Finlay, *Statistical Methods for the Social Sciences*, 3<sup>rd</sup> ed. (Upper Saddle River, NJ: Prentice Hall, 1997).

<sup>46</sup> William H. Greene, *Econometric Analysis*, 5<sup>th</sup> ed. (Upper Saddle River, NJ: Prentice Hall, 2003, p. 847).



## The Duration of the Nomination-and-Confirmation Process

During the entire period covered by this report (1900-2006), the President and the Senate have each taken varying amounts of time to act on Supreme Court nominations and confirmations. As **Table 3** shows, from 1900-2006, Presidents took a median of 28 days after a vacancy occurred to announce their nominees, compared with a median of 22 days for final Senate action once the nomination was announced. The entire process, from actual or prospective vacancy to final Senate action, lasted a median of 76 days from 1900-2006.<sup>47</sup>

However, the amount of time involved in each stage of the nomination-and-confirmation process varies widely when individual cases are examined. Some Supreme Court nominations are unusually fast, coming immediately on the heels a sitting Justice's departure from the bench. In these cases, the President almost certainly knew in advance of the outgoing Justice's intention to retire yet delayed announcement of the retirement to coincide with announcing a new nominee. For example, on May 27, 1986, President Reagan simultaneously announced the retirement of Chief Justice Warren Burger, the elevation of William H. Rehnquist to Chief Justice, and the nomination of Antonin Scalia to assume the Associate Justice seat being vacated by Justice Rehnquist.<sup>48</sup> On the other hand, some nomination decisions can take months—at least to become public. For example, although Justice Harold H. Burton submitted his retirement letter to President Dwight D. Eisenhower on October 6, 1958, Eisenhower did not publicly announce Potter Stewart's nomination until January 17, 1959—103 days after announcing Justice Burton's retirement. The entire interval between Burton's announced retirement and Stewart's confirmation lasted 211 days, the bulk of the interval due to a long congressional recess.<sup>49</sup>

### Changes Since 1981

The data indicate that the median decision-making intervals surrounding Supreme Court nominations have changed substantially since 1981.<sup>50</sup> When comparing Supreme Court

<sup>47</sup> Due to updated data in **Table 1** and **Table 2**, some of the summary statistics here and in **Table 3** have changed from previous versions of this report. This version of the report does not include, when calculating the interval for total Senate action (nomination announcement to final Senate action), cases in which nominations lingered in the Senate, but for which the Senate took no final vote (e.g., the nomination was withdrawn, recommitted, etc.). If the Judiciary Committee held hearings or held a final vote, those dates are included in median calculations.

<sup>48</sup> As previously noted, although Chief Justice Burger, by letter on June 17, 1986, officially notified President Reagan of his desire to retire, Burger privately informed Reagan of his plans on May 27, 1986 ("Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist To Be Chief Justice and Antonin Scalia To Be an Associate Justice," U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1986*, vol. 2, p. 781).

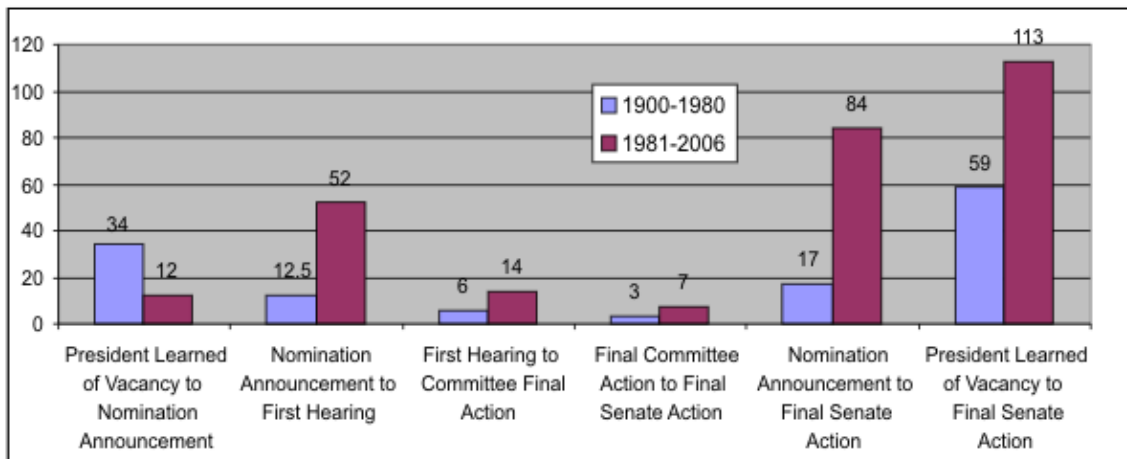
<sup>49</sup> Context provides important caveats, as is always the case when exploring median decision-making surrounding Supreme Court nominations. President Eisenhower recess-appointed Justice Stewart because Congress was not in session on Oct. 6, 1958, when Justice Burton announced his retirement. The 85<sup>th</sup> Congress had adjourned *sine die* on Aug. 24, 1958. The President nominated Potter Stewart to the Court on Jan. 17, 1959, after Congress had reconvened for the first session of the 86<sup>th</sup> Congress. Therefore, although the interval between the starting date (Oct. 6, 1958, as shown in **Table 1**) and nomination date (Jan. 17, 1959) is 103 days, and the entire interval from the starting date until final Senate action (May 5, 1959) is 211 days, the President's actual decision-making timetable could also be classified as eight days, or the interval between Burton's retirement announcement (Oct. 6, 1958) and Eisenhower's recess appointment of Justice Stewart (Oct. 14, 1958). Both intervals are used to calculate the median elapsed time from vacancy to nomination announcement. Nonetheless, the long intervals have a minimal impact on computing the median durations between stages in the process because the median is less sensitive than the mean to extremely high or low values.

<sup>50</sup> For an analysis of the decision-making speed surrounding Supreme Court nominations between 1962-1987, see CRS (continued...)

nominations from 1900-1980 with those from 1981-2006, five patterns stand out. First, after apparently learning of vacancies, Presidents have typically been quicker to announce nominees since 1981 than in the previous 80 years. As shown in **Figure 1** (and **Table 3**), from 1900-1980, Presidents took a median of 34 days to announce their nominees after apparently learning of vacancies, compared with only 12 days from 1981-2006.

Second, and perhaps most notably, the median interval between the President’s announcement of his nominee and the first Judiciary Committee hearing was substantially longer from 1981-2006 than from 1900-1980. As shown in **Figure 1** (and **Table 3**), this period more than tripled—from 12.5 days during the 1900-1980 period to 52 days from 1981-2006. Again, however, context is important. Even before hearings begin, the Senate can be actively working on the nomination. For example, prior to the start of John G. Roberts’s hearings (and even before his nomination was submitted to the Senate), Senators met privately with Judge Roberts, and some pressed the White House to release records from Roberts’s Department of Justice service.<sup>51</sup> The Harriet Miers and Samuel Alito nominations followed similar patterns.

**Figure 1. Speed in Days of Intervals Surrounding Supreme Court Nominations and Confirmations**



**Source:** Computations based on data compiled by the CRS authors. See **Table 3** for rounding information.

Third, committee and floor action from 1981-2006 also took slightly longer than prior to 1981. From 1981-2006, the Judiciary Committee took a median of 14 days to reach a decision after starting hearings, while the interval between final committee action and final Senate action took seven days (compared with six and three days respectively from 1900-1980).

Fourth, as shown in **Figure 1** (and **Table 3**), total Senate activity (the interval between the President’s announcement of the nominee and final Senate action) increased from a median of 17 days (1900-1980) to 84 days (1981-2006).

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Report 87-576, *The Speed With Which Action Has Been Taken on Supreme Court Nominations in the Last 25 Years*, by Denis Steve Rutkus (out of print but available from author).

<sup>51</sup> See, for example, Charles Babington, “Access to Records May Be a Sticking Point; Democrats Push for Prompt Review,” *Washington Post*, July 28, 2005, p. A6; and Mike Allen and Jo Becker, “A Clash Over Roberts Documents; Justice Department Balks at Senate Democrats’ Demands,” *Washington Post*, Aug. 7, 2005, p. A4.

http://wikileaks.org/wiki/CRS-RL33118

Finally, the entire nomination-and-confirmation process took substantially longer after 1980 than during the previous 80 years. The median duration for the entire process (from when the President apparently became aware of a vacancy until the Senate's final action on the nomination) was almost twice as long from 1981-2006 than during 1900-1980 (113 days versus 59 days, respectively).

## Factors Influencing the Speed of the Process

Some elements of the decision-making process surrounding the naming and the confirmation or rejection of Supreme Court nominees are known only to Presidents, nominees, and a few select advisors. Other elements are more obvious. Each nomination has its own political context, making each nomination somewhat different. However, several factors appear to be relatively constant in affecting the speed of Supreme Court nominations and Senate decisions.

### How the Vacancy Occurs

How quickly the President announces his nominee and how quickly the Senate considers that nomination can depend on how the vacancy occurred. When Justices die unexpectedly, Presidents can be eager to bring the Court back to full strength as soon as possible. On July 19, 1949, for example, Justice Frank Murphy unexpectedly died of a heart attack after a brief illness.<sup>52</sup> President Harry S. Truman announced his nomination of Thomas C. Clark at a press conference nine days later, on July 28.<sup>53</sup> The Senate also considered the nomination quickly, beginning hearings on August 9. Clark's entire nomination-and-confirmation process lasted just 30 days. A few months later, Sherman Minton was confirmed even faster—in 24 days—after the death of Justice Wiley B. Rutledge. Nonetheless, sudden death does not guarantee that either the President or the Senate will make nomination-and-confirmation decisions quickly. For example, when Justice Rufus W. Peckham died unexpectedly on October 24, 1909, President William Howard Taft waited 50 days to announce a nominee. Once Taft announced his choice, the Senate confirmed Horace H. Lurton seven days later.

Retirements and resignations are often expected, allowing the President time to prepare for his choice even before an official announcement that a sitting Justice will step down. For example, at the time of his retirement, Justice William O. Douglas's health had been so poor and abilities allegedly in such decline that seven of his fellow Justices voted on October 17, 1975, to "effectively strip Douglas of his power" and excluded the aging Justice from deliberations.<sup>54</sup> By the time Justice Douglas officially wrote to President Gerald R. Ford on November 12, 1975, announcing his retirement, the President was prepared to act quickly. He announced the nomination of John Paul Stevens just 16 days later. Congress, too, acted quickly, confirming Stevens 19 days later, on December 17, 1975.

Sometimes, though, even when retirements or resignations come with advance notice, the process moves slowly. For example, Justice Harry A. Blackmun privately told President William J.

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<sup>52</sup> For a profile of Murphy and his death, see *Chicago Daily Tribune*, "Justice Murphy Dies of Heart Attack at 59," *Chicago Daily Tribune*, July 20, 1949, p. 2.

<sup>53</sup> President Truman did not announce that Clark had accepted the nomination until Aug. 1, 1949 (Edward T. Folliard, "Clark Accepts High Court Proffer," *Washington Post*, Aug. 2, 1949, p. 1).

<sup>54</sup> Justice Byron R. White disagreed with the decision. See Ward, *Deciding to Leave*, p. 187.

Clinton around January 1, 1994, that he was planning to leave the Court. Soon afterward, the White House staff began quietly considering replacements.<sup>55</sup> However, President Clinton did not publicly announce Justice Blackmun's retirement until April 6, did not publicly announce Judge Stephen G. Breyer's nomination until May 13, and did not formally nominate Breyer until May 17.<sup>56</sup> The Judiciary Committee began hearings 60 days after the nomination was announced, and the entire process surrounding Breyer's nomination lasted 209 days. However, decisions affecting the nomination were apparently being made even before Blackmun's retirement became public knowledge.

## The Senate's Schedule

Congress's schedule, especially whether the Senate is in session at all, plays an important role in how long Supreme Court nominations take to reach a conclusion. In the early 1900s, several vacancies arose during summer recess or election years when Congress was away from the Capitol. In 1910, for example, Congress adjourned on June 25 and did not return until December 5—a break of more than five months.<sup>57</sup> In the interim, Chief Justice Melville W. Fuller died of a heart attack on July 4.<sup>58</sup> As press coverage noted at the time, although potential nominees were immediately considered, President William Howard Taft waited to formally submit a nomination to the Senate until Congress reconvened.<sup>59</sup> On December 12, five days after the Senate reconvened, President Taft announced and formally submitted to the Senate his nomination of former Senator Edward D. White of Louisiana to be Chief Justice. That same day, without referring the nomination to the Judiciary Committee, the Senate quickly confirmed Senator White.

Three times during the 1950s, President Eisenhower resorted to recess appointments when Justices died or announced their retirement after Congress had already adjourned for the year.<sup>60</sup> In each case, President Eisenhower formally submitted the nomination after the Senate convened the following January. Of the five persons whom he nominated to the Court, three first received recess appointments and served as Justices before being confirmed—Earl Warren (as Chief Justice) in 1953, William Brennan in 1956, and Potter Stewart in 1958. President Eisenhower's recess appointments, however, generated controversy, prompting the Senate in 1960, voting closely along party lines, to pass a resolution expressing opposition to Supreme Court recess appointments in the future.<sup>61</sup>

<sup>55</sup> Tony Mauro, "How Blackmun Hid Retirement Plans," *New Jersey Law Journal*, Apr. 25, 1994, p. 18.

<sup>56</sup> U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1994*, vol. 1 (Washington: GPO, 1995), p. 597.

<sup>57</sup> U.S. Congress, Joint Committee on Printing, *2003-2004 Official Congressional Directory: 108<sup>th</sup> Congress* (Washington: GPO), p. 517.

<sup>58</sup> "Justice Fuller Dies Suddenly," *Washington Post*, July 5, 1910, p. 1.

<sup>59</sup> In addition to waiting for the Senate to return, President Taft reportedly considered more than 200 nominees, a far more thorough process than the media predicted after Fuller's death (ibid. and "White Heads Bench," *Washington Post*, Dec. 13, 1910, p. 1).

<sup>60</sup> The discussion of recess appointments in the following two paragraphs is adapted from CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

<sup>61</sup> Adopted by the Senate on Aug. 29, 1960, by a 48-37 vote, S.Res. 334 expressed the sense of the Senate that recess appointments to the Supreme Court "should not be made, except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." Proponents of the resolution contended, among other things, that judicial independence would be affected if Supreme Court recess (continued...)

President Eisenhower's actions were the most recent recess appointments to the Supreme Court, and recess appointments to the lower federal courts also have become relatively rare since the late 1960s. While a President's constitutional power to make judicial recess appointments was upheld by a federal court in 1985,<sup>62</sup> such appointments, when they do occur, may cause controversy, in large part because they bypass the Senate and its "advice and consent" role. Because of the criticisms of judicial recess appointments in recent decades, the long passage of time since the last Supreme Court recess appointment, and the relatively short duration of contemporary Senate recesses (which arguably undercuts the need for recess appointments to the Court), a President in the 21<sup>st</sup> century might be expected to make a recess appointment to the Supreme Court only under the most unusual of circumstances.<sup>63</sup>

Today, Congress's availability is less of an obstacle to speedy consideration of nominations than in the past. Given Congress's increasingly year-round schedule, extended decision-making is more often the result of waiting for presidential decisions, background investigations of nominees, or preparations for Judiciary Committee hearings.

### Committee Involvement and Institutional Customs

Today, it would be highly unusual for the Judiciary Committee not to hold Supreme Court confirmation hearings lasting at least a few days. In the past, however, the Judiciary Committee often handled Supreme Court nominations without holding hearings at all. As **Table 1** shows, of the 22 nominees to the Court from 1900 to 1937, only three had Judiciary Committee hearings (Louis D. Brandeis in 1916, Harlan F. Stone in 1925, and John J. Parker in 1930 (whose nomination was eventually rejected)). In contrast, of the 41 nominees after 1937, only three *did*

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(...continued)

appointees, during the probationary period of their appointment, took positions to please the President (in order not to have the President withdraw their nominations) or to please the Senate (in order to gain confirmation of their nominations). It also was argued that Senate investigation of nominations of these recess appointees was made difficult by the oath preventing sitting Justices from testifying about matters pending before the Court. Opponents, however, said, among other things, that the resolution was an attempt to restrict the President's constitutional recess appointment powers and that recess appointments were sometimes called for in order to keep the Court at full strength and to prevent evenly split rulings by its members. See "Opposition to Recess Appointments to the Supreme Court," debate in the Senate on S.Res. 334, *Congressional Record*, vol. 106, Aug. 29, 1960, pp. 18130-18145. See also CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead. For an overview of judicial recess appointments during the George W. Bush presidency (none of which were to the Supreme Court), see CRS Report RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-September 5, 2006*, by Henry B. Hogue and Maureen Bearden.

<sup>62</sup> *U.S. v. Woodley*, 751 F.2d 1008 (9<sup>th</sup> Cir. 1985).

<sup>63</sup> A notable, relatively recent instance in which the possibility of a recess appointment to the Supreme Court was raised occurred on July 28, 1987, when Senate Minority Leader Robert Dole observed that President Reagan had the constitutional prerogative to recess appoint U.S. appellate court judge Robert H. Bork to the Court. Earlier that month Judge Bork had been nominated to the Court, and at the time of Senator Dole's statement, the chair of Senate Judiciary Committee, Sen. Joseph R. Biden, Jr. had scheduled confirmation hearings to begin on September 15. With various Republican Senators accusing Senate Democrats of delaying the Bork hearings, Senator Dole offered as "food for thought" the possibility of President Reagan recess appointing Judge Bork during Congress's August recess. See Michael Fumento, "Reagan Has Power To Seat Bork While Senate Stalls: Dole," *Washington Times*, July 28, 1987, p. A3; also, Edward Walsh, "Reagan's Power To Make Recess Appointment Is Noted," *Washington Post*, July 28, 1987, p. A8. Judge Bork, however, did not receive a recess appointment and, as a Supreme Court nominee, was rejected by the Senate in a 58-42 vote on Oct. 23, 1987.

not have hearings.<sup>64</sup> Nominees did not begin regularly testifying at their own hearings until John M. Harlan did so in 1955.<sup>65</sup>

When the Judiciary Committee holds hearings, Senate floor consideration can be pushed back sometimes by weeks or even months. Controversial nominees often spur protracted hearings. For example, the Judiciary Committee spent 19 days considering Justice Louis D. Brandeis's nomination in 1916, and the interval between the start of hearings and final committee action lasted 105 days. The final Senate vote came eight days later. More recently, the Judiciary Committee, after learning of President Ronald Reagan's selection of Robert H. Bork, took 76 days to hold its first day of hearings on the nomination, and then 21 more days to conclude action on the nomination.

Senate custom plays an especially large role when sitting or former Senators are nominated to the Court. The Senate has almost always considered their colleagues's nominations to the Court within days of receiving the nomination, often without committee hearings or floor debate.<sup>66</sup> For example, although President Taft waited five months to nominate Edward D. White (a former Senator from Louisiana) for Chief Justice, the Senate confirmed the nomination with no debate in less than one hour.<sup>67</sup> Since 1900, three sitting Senators—Hugo L. Black of Alabama (1937), James F. Byrnes of South Carolina (1941), and Harold H. Burton of Ohio (1945)—have been nominated to the Court, and all were quickly confirmed.<sup>68</sup> Senators George Sutherland of Utah (1922) and Sherman Minton of Indiana (1949) were nominated to the Court after having concluded their Senate service. Sutherland was confirmed on the same day on which President Warren Harding announced the nomination, and Minton was confirmed in 19 days.

The decades since 1945 have yet to test again the Senate tradition of bypassing the Judiciary Committee when the Supreme Court nominee is a sitting U.S. Senator; no President since then has nominated a sitting Senator. The last *former* Senator to be nominated to the Court, in 1949, was Judge Sherman Minton of Indiana. (After defeat for re-election to the Senate in 1940, he had been appointed by President Franklin D. Roosevelt to a federal appellate court judgeship.) In a break with tradition, the Supreme Court nomination of former Senator Minton was referred to the Judiciary Committee, and Senate confirmation followed the day after the committee approved the nomination.

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<sup>64</sup> This number does not include instances such as the John G. Roberts *Associate Justice* nomination, in which the Judiciary Committee did not have the opportunity to hold hearings. Hearings before the Judiciary Committee were dispensed with for three nominees: Frank Murphy in 1939, James F. Byrnes in 1941, and Harold H. Burton in 1945, all of whom had prior service in high public office. Murphy had previously served as Governor of Michigan and U.S. Attorney General. Byrnes was a sitting Senator from South Carolina when nominated to the Court. Harold H. Burton was a Senator from Ohio. (Biographical information obtained from the Federal Judicial Center's Federal Judges Biographical Database, available at <http://www.fjc.gov/public/home.nsf/hisj>).

<sup>65</sup> See CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

<sup>66</sup> For additional background information on Senators giving current or former colleagues deference when nominated to the Court, see Rutkus, *Supreme Court Appointments Process*, pp. 17-18.

<sup>67</sup> "White Heads Bench," *Washington Post*, Dec. 13, 1910, p. 1.

<sup>68</sup> Senators Burton and Byrnes's nominations were not referred to the Judiciary Committee. Sen. Black's nomination was referred to the committee, which recommended his confirmation, although by a divided 13-4 vote.

## Controversial Nominations

As noted previously, withdrawn, rejected, or controversial nominations can substantially lengthen the process. In these cases, although Presidents often name nominees fairly quickly, consideration of the nominations can be drawn out in the Senate. During Judge Robert H. Bork's controversial nomination, for example, Senate consideration of Bork lasted more than a month, from the first Judiciary Committee hearing on September 15, 1987, until the Senate's floor vote to reject the nomination on October 23, 1987. The entire process—from President Reagan's announcement of his intention to nominate Bork to Senate rejection—took 119 days.

Controversy can also delay confirmation of nominees who are ultimately successful. Despite a relatively quick nomination-and-confirmation process of 42 days in late 1924 and early 1925 for then-Attorney General Harlan F. Stone, his nomination was temporarily set back when it was recommitted to the Senate Judiciary Committee, apparently because of Stone's investigation as Attorney General of Senator Burton K. Wheeler.<sup>69</sup> More recently, although Judge Clarence Thomas narrowly won confirmation in 1991, nominating and confirming him took 110 days, including a second round of Judiciary Committee hearings surrounding law professor Anita Hill's allegations against Thomas of sexual harassment.

## Discussion and Conclusions

Understanding how long the previous Supreme Court nomination-and-confirmation process has taken, and what factors affected that schedule, can provide useful perspective on presidential decision-making and the Senate's preparations for future nominations. While Presidents and supporters of nominees want Justices confirmed quickly, some Senators will continue to emphasize their right to consider nominees carefully and their responsibility to hold sufficient hearings. Against that political backdrop, this report demonstrates that the length of time required to nominate and confirm or reject a nominee varies widely. Even median durations must be interpreted cautiously. The context surrounding each nomination is particularly important in understanding how long the process takes.

Given the advanced ages of some members of the current Court, more vacancies in the near future are widely anticipated. Should those vacancies occur unexpectedly, such as with a sudden retirement or death, the Court could well be operating without a full bench—making the timing of nominations and confirmations even more pressing. In such a scenario, the Senate would likely be under intense pressure to confirm a successor quickly. This report indicates that, from 1900-1980, the President's portion of the process took longer than the Senate's. Since 1981, though, there has been a substantial increase in the median duration between the President's announcement of a nominee and the start of Judiciary Committee hearings. As a result, the Senate's portion of the process has taken longer than the President's.

Prior to 1981, lengthy nomination-and-confirmation processes usually occurred because either the Senate was out of session when a vacancy on the Court arose, or the nomination was controversial. In recent decades, by contrast, slower decision-making has taken place during an era when Congress is in session longer than during the early 20<sup>th</sup> century.

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<sup>69</sup> On Stone's testimony before the Judiciary Committee regarding the investigation, see Albert W. Fox, "Stone Tells Senate Committee He Assumes Full Responsibility For Pressing New Wheeler Case," *Washington Post*, Jan. 29, 1925, p. 1.

Since 1981, the nomination-and-confirmation process has lasted a median of 113 days—almost twice as long as the 59-day median from 1900-1980. Although the data in **Table 1**, **Table 2**, and **Table 3** provide a median measure of the process, political context is an essential backdrop for understanding the numbers. The President and the Senate share decision-making responsibilities for placing new Justices on the Court. Ultimately, the choices each institution makes determine how long nominations and confirmations take.

One possible explanation for the paradox of slower decisions despite more time in session is that, as some critics on both sides of the aisle contend, Supreme Court nominations have become battlegrounds for larger political debates.<sup>70</sup> Another possibility is that the Senate is considering nominations more carefully than in the past, and therefore taking more time to make decisions about nominees. Similarly, the Senate might be using longer decision-making and scrutiny of nominees as a method of counterbalancing presidential power, especially when Senators believe that the President has chosen an unqualified nominee.

Some early 20<sup>th</sup> century appointments to the Supreme Court were confirmed within days of a vacancy occurring. More recent nominations and confirmations, by contrast, typically have taken several weeks or months. How and when a vacancy occurs, the Senate's schedule, Judiciary Committee involvement, institutional customs, and whether or not the nomination is controversial, all affect the speed with which the President nominates, and the Senate passes judgment, on prospective Justices.

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<sup>70</sup> On increasingly controversial judicial nominations, see chapter 4 in Walter F. Murphy, C. Herman Pritchett, and Lee Epstein, *Courts, Judges, & Politics: An Introduction to the Judicial Process*, 5<sup>th</sup> ed. (Boston: McGraw Hill, 2002); [Thomas O. Sargentich, Paul D. Carrington, Barbara E. Reed, Charles Gardner Geyh, and Erwin Chemerinsky], *Uncertain Justice: Politics and America's Courts: The Reports of the Task Forces of Citizens for Independent Courts* (New York: The Century Foundation, 2000); and Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton & Company, 1994).



**Table I. Major Events in the Supreme Court Nomination-and-Confirmation Process, 1900-2006**

| Nominating President | Outgoing Justice                  | Actual or Prospective Vacancy Apparently Became Known to President |   | President's Announcement of Nominee |                         | Senate Action Dates on Nomination                  |                        |                     |
|----------------------|-----------------------------------|--|---|-------------------------------------|-------------------------|--|------------------------|---------------------|
|                      |                                   | When   | How   | Nominee                             | Date                    | First Hearing                                      | Committee Final Action | Senate Final Action |
| Theodore Roosevelt   | Horace Gray                       | 09/15/1902   | Death of outgoing Justice   | Oliver Wendell Holmes               | 12/02/1902              | No record of hearing                               | 12/04/1902             | 12/04/1902          |
| Theodore Roosevelt   | George Shiras, Jr.                | 08/20/1902 <sup>a</sup>  | Public reports of imminent retirement                                   | William R. Day                      | 01/14/1903 <sup>b</sup> | No record of hearing                               | 02/23/1903             | 02/23/1903          |
| Theodore Roosevelt   | Henry B. Brown                    | 03/08/1906 <sup>c</sup>  | Outgoing Justice notified President of intention to retire <sup>d</sup> | William H. Moody                    | 11/07/1906              | No record of hearing                               | 12/10/1906             | 12/12/1906          |
| William Howard Taft  | Rufus W. Peckham                  | 10/24/1909   | Death of outgoing Justice   | Horace H. Lurton                    | 12/13/1909 <sup>e</sup> | No record of hearing                               | 12/16/1909             | 12/20/1909          |
| William Howard Taft  | David J. Brewer                   | 3/28/1910  | Death of outgoing Justice   | Charles Evans Hughes                | 4/25/1910               | No record of hearing                               | 05/02/1910             | 05/02/1910          |
| William Howard Taft  | Melville W. Fuller, Chief Justice | 07/04/1910   | Death of outgoing Chief Justice   | Edward D. White                     | 12/12/1910              | Nomination was not referred to Judiciary Committee |                        | 12/12/1910          |
| William Howard Taft  | Edward D. White                   | 12/12/1910   | Justice Edward D. White nomination to be Chief Justice                  | Willis Van Devanter                 | 12/12/1910              | No record of hearing                               | 12/15/1910             | 12/15/1910          |
| William Howard Taft  | William H. Moody                  | 06/15/1910 <sup>f</sup>  | Congressional action authorizing retirement                             | Joseph R. Lamar                     | 12/12/1910              | No record of hearing                               | 12/15/1910             | 12/15/1910          |
| William Howard Taft  | John Marshall Harlan              | 10/14/1911   | Death of outgoing Justice   | Mahlon Pitney                       | 02/19/1912              | No record of hearing                               | 03/04/1912             | 03/13/1912          |
| Woodrow Wilson       | Horace H. Lurton                  | 07/12/1914   | Death of outgoing Justice   | James C. McReynolds                 | 08/19/1914 <sup>g</sup> | No record of hearing                               | 08/24/1914             | 08/29/1914          |
| Woodrow Wilson       | Joseph R. Lamar                   | 01/02/1916   | Death of outgoing Justice   | Louis D. Brandeis                   | 01/28/1916              | 02/09/1916   | 05/24/1916             | 06/01/1916          |
| Woodrow Wilson       | Charles Evans Hughes              | 06/10/1916 <sup>h</sup>  | Resignation letter submitted to President                               | John H. Clarke                      | 07/14/1916              | No record of hearing                               | 07/24/1916             | 07/24/1916          |

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| Nominating President  | Outgoing Justice                            | Actual or Prospective Vacancy Apparently Became Known to President |   | President's Announcement of Nominee |                         | Senate Action Dates on Nomination                  |                          |   |
|-----------------------|---|--|---|-------------------------------------|-------------------------|--|--------------------------|---|
|                       |   | When   | How   | Nominee                             | Date                    | First Hearing                                      | Committee Final Action   | Senate Final Action   |
| Warren Harding        | Edward D. White                             | 05/19/1921   | Death of outgoing Justice                                 | William Howard Taft                 | 06/30/1921              | Nomination was not referred to Judiciary Committee |                          | 06/30/1921  |
| Warren Harding        | John H. Clarke                              | 09/05/1922   | Resignation letter submitted to President                 | George Sutherland                   | 09/05/1922              | Nomination was not referred to Judiciary Committee |                          | 09/05/1922  |
| Warren Harding        | William R. Day                              | 09/05/1922 <sup>i</sup>  | Public reports of imminent retirement                     | Pierce Butler                       | 11/23/1922              | No record of hearing                               | 11/28/1922               | Placed on Executive Calendar on 11/28/1922, with no record of further action <sup>l</sup> |
|                       |   | 12/04/1922   | Lack of action on first nomination of Butler              | Pierce Butler                       | 12/05/1922              | No record of hearing                               | 12/18/1922               | 12/21/1922  |
| Warren Harding        | Mahlon Pitney                               | 12/16/1922   | White House announced forthcoming retirement <sup>k</sup> | Edward T. Sanford                   | 01/09/1923 <sup>l</sup> | No record of hearing                               | 01/29/1923               | 01/29/1923  |
| Calvin Coolidge       | Joseph McKenna                              | 12/25/1924 <sup>m</sup>  | Public reports of forthcoming retirement                  | Harlan F. Stone                     | 01/05/1925              | 01/28/1925   | 01/21/1925<br>02/02/1925 | Recommended 01/26/1925<br>02/05/1925  |
| Herbert Hoover        | William Howard Taft<br><i>Chief Justice</i> | 02/03/1930   | Retirement letter submitted to President                  | Charles Evans Hughes                | 02/03/1930              | No record of hearing                               | 02/10/1930               | 02/13/1930  |
| Herbert Hoover        | Edward T. Sanford                           | 03/08/1930   | Death of outgoing Justice                                 | John J. Parker                      | 03/21/1930              | 04/05/1930   | 04/21/1930               | Rejected 05/07/1930   |
| Herbert Hoover        | Edward T. Sanford                           | 05/07/1930   | Parker nomination rejected by Senate                      | Owen J. Roberts                     | 05/09/1930              | No record of hearing                               | 05/19/1930               | 05/20/1930  |
| Herbert Hoover        | Oliver Wendell Holmes, Jr.                  | 01/12/1932   | Retirement letter submitted to President                  | Benjamin N. Cardozo                 | 02/15/1932              | 02/19/1932   | 02/23/1932               | 02/24/1932  |
| Franklin D. Roosevelt | Willis Van Devanter                         | 05/18/1937 <sup>n</sup>  | Retirement letter submitted to President                  | Hugo L. Black                       | 08/12/1937              | No record of hearing                               | 08/16/1937               | 08/17/1937  |

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| Nominating President  | Outgoing Justice                             | Actual or Prospective Vacancy Apparently Became Known to President |   | President's Announcement of Nominee |                         | Senate Action Dates on Nomination                  |                        |                     |
|-----------------------|--|--|---|-------------------------------------|-------------------------|--|------------------------|---------------------|
|                       |  | When   | How   | Nominee                             | Date                    | First Hearing                                      | Committee Final Action | Senate Final Action |
| Franklin D. Roosevelt | George Sutherland                            | 01/05/1938   | Retirement letter submitted to President                                | Stanley F. Reed                     | 01/15/1938 <sup>o</sup> | 01/20/1938   | 01/24/1938             | 01/25/1938          |
| Franklin D. Roosevelt | Benjamin N. Cardozo                          | 07/09/1938 <sup>p</sup>  | Death of outgoing Justice   | Felix Frankfurter                   | 01/05/1939              | 01/10/1939   | 01/16/1939             | 01/17/1939          |
| Franklin D. Roosevelt | Louis D. Brandeis                            | 02/13/1939 <sup>q</sup>  | Retirement letter submitted to President                                | William O. Douglas                  | 03/20/1939              | 03/24/1939   | 03/27/1939             | 04/04/1939          |
| Franklin D. Roosevelt | Pierce Butler                                | 11/16/1939   | Death of outgoing Justice   | Frank Murphy                        | 01/04/1940              | 01/11/1940   | 01/15/1940             | 01/16/1940          |
| Franklin D. Roosevelt | James Clark McReynolds                       | 01/22/1941   | Outgoing Justice notified President of intention to retire <sup>r</sup> | James F. Byrnes                     | 06/12/1941              | Nomination was not referred to Judiciary Committee |                        | 06/12/1941          |
| Franklin D. Roosevelt | Charles Evans Hughes<br><i>Chief Justice</i> | 06/02/1941 <sup>s</sup>  | Retirement letter submitted to President                                | Harlan F. Stone                     | 06/12/1941              | 06/21/1941   | 06/23/1941             | 06/27/1941          |
| Franklin D. Roosevelt | Harlan F. Stone                              | 06/12/1941   | Harlan F. Stone nomination to be Chief Justice                          | Robert H. Jackson                   | 06/12/1941              | 06/21/1941   | 06/30/1941             | 07/07/1941          |
| Franklin D. Roosevelt | James F. Byrnes                              | 10/03/1942 <sup>t</sup>  | Byrnes appointment to other public office                               | Wiley B. Rutledge                   | 01/11/1943              | 01/22/1943   | 02/01/1943             | 02/08/1943          |
| Harry S. Truman       | Owen J. Roberts                              | 06/30/1945 <sup>u</sup>  | Retirement letter submitted to President                                | Harold H. Burton                    | 09/18/1945              | No record of hearing                               | 09/19/1945             | 09/19/1945          |
| Harry S. Truman       | Harlan F. Stone<br><i>Chief Justice</i>      | 04/22/1946   | Death of outgoing Chief Justice   | Fred M. Vinson                      | 06/06/1946              | 06/14/1946   | 06/19/1946             | 06/20/1946          |
| Harry S. Truman       | Frank Murphy                                 | 07/19/1949   | Death of outgoing Justice   | Thomas C. Clark                     | 07/28/1949              | 08/09/1949   | 08/12/1949             | 08/18/1949          |
| Harry S. Truman       | Wiley B. Rutledge                            | 09/10/1949   | Death of outgoing Justice   | Sherman Minton                      | 09/15/1949              | 09/27/1949   | 10/03/1949             | 10/04/1949          |

| Nominating President | Outgoing Justice                       | Actual or Prospective Vacancy Apparently Became Known to President |  | President's Announcement of Nominee |                           | Senate Action Dates on Nomination   |                             |   |
|----------------------|--|--|--|-------------------------------------|---------------------------|---|-----------------------------|---|
|                      |  | When   | How  | Nominee                             | Date                      | First Hearing   | Committee Final Action      | Senate Final Action                           |
| Dwight D. Eisenhower | Fred M. Vinson<br><i>Chief Justice</i> | 09/08/1953   | Death of outgoing Chief Justice  | Earl Warren                         | 01/11/1954                | <i>Recess appointment, 10/02/1953</i><br>02/02/1954 02/24/1954 03/01/1954 |                             |   |
| Dwight D. Eisenhower | Robert H. Jackson                      | 10/09/1954   | Death of outgoing Justice  | John Marshall Harlan II             | 11/08/1954 <sup>v</sup>   | No record of hearing, committee vote, or Senate vote                      |                             |   |
|                      |  | 01/05/1955<br>(Congress reconvenes)                                | Lack of action on first nomination of Harlan                             | John Marshall Harlan II             | 01/10/1955                | 02/24/1955  | 03/10/1955                  | 03/16/1955                                    |
| Dwight D. Eisenhower | Sherman Minton                         | 09/07/1956   | Retirement letter submitted to President                                 | William J. Brennan                  | 01/14/1957                | <i>Recess appointment, 10/15/1956</i><br>02/26/1957 03/04/1957 03/19/1957 |                             |   |
| Dwight D. Eisenhower | Stanley F. Reed                        | 01/31/1957   | Press conference held by Reed announcing retirement <sup>w</sup>         | Charles E. Whittaker                | 03/02/1957                | 03/18/1957  | 03/18/1957                  | 03/19/1957                                    |
| Dwight D. Eisenhower | Harold H. Burton                       | 10/06/1958   | Retirement letter submitted to President                                 | Potter Stewart                      | 01/17/1959                | <i>Recess Appointment, 10/14/1958</i><br>04/09/1959 04/20/1959 05/05/1959 |                             |   |
| John F. Kennedy      | Charles E. Whittaker                   | 03/28/1962   | Retirement letter received by President <sup>x</sup>                     | Byron R. White                      | 03/30/1962 <sup>y</sup>   | 04/11/1962  | 04/11/1962                  | 04/11/1962                                    |
| John F. Kennedy      | Felix Frankfurter                      | 08/28/1962 <sup>z</sup>  | Retirement letter submitted to President                                 | Arthur J. Goldberg                  | 08/29/1962                | 09/11/1962  | 09/25/1962                  | 09/25/1962                                    |
| Lyndon B. Johnson    | Arthur J. Goldberg                     | 07/20/1965   | Goldberg appointment to other public office <sup>aa</sup>                | Abe Fortas                          | 07/28/1965 <sup>bbb</sup> | 08/05/1965  | 08/10/1965                  | 08/11/1965                                    |
| Lyndon B. Johnson    | Thomas C. Clark                        | 02/28/1967   | Outgoing Justice notified President of intention to retire <sup>cc</sup> | Thurgood Marshall                   | 06/13/1967 <sup>dd</sup>  | 07/13/1967  | 08/03/1967                  | 08/30/1967                                    |
| Lyndon B. Johnson    | Earl Warren<br><i>Chief Justice</i>    | 06/13/1968 <sup>ee</sup>   | Retirement letter submitted to President                                 | Abe Fortas                          | 06/26/1968                | 07/11/1968  | 09/17/1968                  | 10/01/1968 (Cloture motion rejected)          |
| Lyndon B. Johnson    | Abe Fortas                             | 06/26/1968 <sup>ff</sup>   | Fortas nomination to be Chief Justice                                    | Homer Thornberry                    | 06/26/1968                | 07/11/1968  | No record of committee vote | Nomination withdrawn by President, 10/04/1968 |

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| Nominating President | Outgoing Justice                         | Actual or Prospective Vacancy Apparently Became Known to President |   | President's Announcement of Nominee |                          | Senate Action Dates on Nomination |   |                       |
|----------------------|--|--|---|-------------------------------------|--------------------------|-----------------------------------|---|-----------------------|
|                      |  | When   | How   | Nominee                             | Date                     | First Hearing                     | Committee Final Action  | Senate Final Action   |
| Richard M. Nixon     | Earl Warren<br><i>Chief Justice</i>      | 01/20/1969 <sup>gg</sup>   | Fortas Chief Justice nomination withdrawn by President Johnson (10/04/1968) | Warren E. Burger                    | 05/21/1969               | 06/03/1969                        | 06/03/1969  | 06/09/1969            |
| Richard M. Nixon     | Abe Fortas                               | 05/14/1969   | Resignation letter submitted to President                                   | Clement F. Haynsworth, Jr.          | 08/18/1969 <sup>hh</sup> | 09/16/1969                        | 10/09/1969  | 11/21/1969 (Rejected) |
|                      |  | 11/21/1969   | Haynsworth nomination rejected by Senate                                    | G. Harrold Carswell                 | 01/19/1970               | 01/27/1970                        | 02/16/1970  | 04/08/1970 (Rejected) |
|                      |  | 04/08/1970   | Carswell nomination rejected by Senate                                      | Harry A. Blackmun                   | 04/14/1970               | 04/29/1970                        | 05/06/1970  | 05/12/1970            |
| Richard M. Nixon     | Hugo L. Black                            | 09/17/1971   | Retirement letter submitted to President                                    | Lewis F. Powell, Jr.                | 10/21/1971               | 11/03/1971                        | 11/23/1971  | 12/06/1971            |
| Richard M. Nixon     | John Marshall Harlan II                  | 09/23/1971   | Retirement letter submitted to President                                    | William H. Rehnquist                | 10/21/1971               | 11/03/1971                        | 11/23/1971  | 12/10/1971            |
| Gerald R. Ford       | William O. Douglas                       | 11/12/1975 <sup>ii</sup>   | Retirement letter submitted to President                                    | John Paul Stevens                   | 11/28/1975 <sup>ii</sup> | 12/08/1975                        | 12/11/1975  | 12/17/1975            |
| Ronald Reagan        | Potter Stewart                           | 05/18/1981 <sup>kk</sup>   | Retirement letter submitted to President                                    | Sandra Day O'Connor                 | 07/07/1981 <sup>ll</sup> | 09/09/1981                        | 09/15/1981  | 09/21/1981            |
| Ronald Reagan        | Warren E. Burger<br><i>Chief Justice</i> | 05/27/1986 <sup>mm</sup>   | Chief Justice privately alerted President of intention to retire            | William H. Rehnquist                | 06/17/1986               | 07/29/1986                        | 08/14/1986  | 09/17/1986            |
| Ronald Reagan        | William H. Rehnquist                     | 05/27/1986 <sup>nn</sup>   | Rehnquist nomination by Reagan to be Chief Justice                          | Antonin Scalia                      | 06/17/1986               | 08/05/1986                        | 08/14/1986  | 09/17/1986            |
| Ronald Reagan        | Lewis F. Powell, Jr.                     | 06/26/1987 <sup>oo</sup>   | Press conference held by Powell announcing retirement                       | Robert H. Bork                      | 07/01/1987               | 09/15/1987                        | 10/06/1987  | 10/23/1987 (Rejected) |
|                      |  | 10/23/1987   | Bork nomination rejected by Senate  | Douglas H. Ginsburg                 | 10/29/1987               |                                   | Ginsburg withdrew (11/07/1987) before official nomination <sup>pp</sup> |                       |

http://www.flsenate.gov/legistics/118

| Nominating President | Outgoing Justice     | Actual or Prospective Vacancy Apparently Became Known to President |  | President's Announcement of Nominee |                          | Senate Action Dates on Nomination   |                        |                     |
|----------------------|----------------------|--|--|-------------------------------------|--------------------------|---|------------------------|---------------------|
|                      |                      | When   | How  | Nominee                             | Date                     | First Hearing   | Committee Final Action | Senate Final Action |
|                      |                      | 11/07/1987   | Ginsburg withdrawal  | Anthony M. Kennedy                  | 11/11/1987               | 12/14/1987  | 01/27/1988             | 02/03/1988          |
| George H.W. Bush     | William J. Brennan   | 07/20/1990   | Retirement letter submitted to President                                     | David H. Souter                     | 07/23/1990 <sup>qq</sup> | 09/13/1990  | 09/27/1990             | 10/02/1990          |
| George H.W. Bush     | Thurgood Marshall    | 06/27/1991   | Retirement letter submitted to President                                     | Clarence Thomas                     | 07/01/1991               | 09/10/1991  | 09/27/1991             | 10/15/1991          |
| William J. Clinton   | Byron R. White       | 03/19/1993 <sup>rr</sup>   | Retirement letter submitted to President                                     | Ruth Bader Ginsburg                 | 06/14/1993 <sup>ss</sup> | 07/20/1993  | 07/29/1993             | 08/03/1993          |
| William J. Clinton   | Harry A. Blackmun    | 01/01/1994 <sup>tt</sup>   | Justice privately alerted President of forthcoming retirement                | Stephen G. Breyer                   | 05/13/1994               | 07/12/1994  | 07/19/1994             | 07/29/1994          |
| George W. Bush       | Sandra Day O'Connor  | 07/01/2005   | Retirement letter submitted to President                                     | John G. Roberts                     | 07/19/2005               | Nomination was withdrawn by President (09/05/2005) before the start of Judiciary Committee hearings; re-nominated as Chief Justice (09/05/2005) |                        |                     |
|                      |                      | 09/05/2005   | Announcement of Roberts nomination withdrawal and re-submission by President | Harriet E. Miers                    | 10/03/2005               | Miers withdrew as nominee (10/27/2005) before the start of Judiciary Committee hearings   |                        |                     |
|                      |                      | 10/27/2005   | Announcement of Miers withdrawal   | Samuel A. Alito, Jr.                | 10/31/2005               | 01/09/2006  | 01/24/2006             | 01/31/2006          |
| George W. Bush       | William H. Rehnquist | 09/03/2005   | Death of outgoing Justice  | John G. Roberts                     | 09/05/2005               | 09/12/2005  | 09/22/2005             | 09/29/2005          |

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**Sources:** As described in the text, this research relied on historical newspapers, official presidential papers, and CRS correspondence with Presidential Libraries. Ward's *Deciding to Leave* was especially useful in compiling data on the reasons why Justices left the bench. Additional source information appears in the table notes below.

- a. It is unclear when President Theodore Roosevelt learned of Justice Shiras's intention to retire. However, *Washington Post* coverage suggests that Shiras's forthcoming departure was well known in Washington, DC by at least Aug. 20, 1902 ("nox May Not Want It: Belief that He Would Decline Justice Shiras's Position," *Washington Post*, Aug. 20, 1902, p. 1).
- b. President Roosevelt did not formally announce Day's nomination until Feb. 19, 1903. However, the *Washington Post* reported as early as Jan. 14, 1903 that President Roosevelt had already offered Day the nomination, after William Howard Taft declined the offer in favor of continuing his position as Civil Governor of the Philippine Islands ("eclined by Taft," *Washington Post*, Jan. 14, 1903, p. 1).

- c. According to the *Washington Post*, Justice Brown notified the President, on Mar. 8, 1906, that he wished to retire (“To Leave the Bench: Justice Brown Will Retire in the Fall,” *Washington Post*, Mar. 8, 1906, p. 3).
- d. It is unclear from the historical record whether the President learned of Justice Brown’s desire to retire by letter, personal conversation, etc.
- e. Despite the delay between Justice Peckham’s death and President William Howard Taft’s nomination of Horace H. Lurton, President Taft, in nominating Lurton, was reportedly “adhering to his original purpose to promote Judge Lurton, whom he has known for years, and with whom he served on the bench,” (“Taft Names Lurton,” *Washington Post*, Dec. 14, 1909, p. 3).
- f. Justice Moody did not actually depart the Court until Nov. 20, 1910 (Ward, *Deciding to Leave*, p. 5). However, “Illness of a serious nature has kept Justice Moody from his duties in the Supreme Court for almost a year. There have been occasional rumors of retirement, but Senator Lodge [on June 15, 1910] presented the real harbinger of that action, in the form of a bill extending the statute relating to retirement from the Supreme Court to cover the case of Mr. Moody” (“Moody Will Retire,” *Washington Post*, June 15, 1910, p. 1).
- g. Although Justice McReynolds’s nomination was not announced until Aug. 20, 1914, the *Washington Post* reported on Aug. 19 that President Woodrow Wilson had “definitely decided” on McReynolds (“Picks McReynolds,” *Washington Post*, Aug. 19, 1914, p. 1), thereby informally alerting Congress to the President’s choice.
- h. On June 10, 1916, Justice Hughes resigned to pursue the 1916 Republican presidential nomination (“Hughes, With Words That Ring, Obeys Call to Lead Republicans,” *Washington Post*, June 11, 1916, p. 1). Although historical media research does not indicate that President Wilson knew for certain that Justice Hughes would resign, media reports had hinted at a Hughes resignation throughout the spring of 1916.
- i. Day did not leave the Court until Nov. 13, 1922. However, the *Washington Post* reported that Day’s consideration of retirement was mentioned at a White House briefing on Sept. 5, 1922 (“Justice Day May Leave the Bench,” *Washington Post*, Sept. 6, 1922, p. 1).
- j. After the Senate took no final action on Butler’s nomination by the end of the third session of the 67<sup>th</sup> Congress on Dec. 4, 1922, President Warren Harding re-nominated Butler on Dec. 5, 1922. See “Fight Over Butler’s Nomination Forecast,” *Washington Post*, Dec. 6, 1922, p. 12; and “Fight Against Butler Opened by Shipstead,” *Washington Post*, Dec. 9, 1922, p. 2.
- k. Although Justice Pitney’s resignation was effective as of Dec. 31, 1922, the White House announced Pitney’s forthcoming departure on Dec. 16, 1922 (“Resigns,” *Chicago Daily Tribune*, Dec. 17, 1922, p. 17).
- l. President Warren Harding did not officially nominate Sanford until Jan. 24, 1923. However, the media reported as early as Jan. 9, 1923, that President Harding intended to nominate Sanford (“E.T. Sanford Choice for Supreme Court,” *Washington Post*, Jan. 9, 1923, p. 1).
- m. Justice McKenna did not officially retire until Jan. 5, 1925. However, the media reported his imminent retirement on Dec. 25, 1924 (“McKenna to Retire Soon as a Justice of the Supreme Court,” *Washington Post*, Dec. 25, 1924, p. 2).
- n. For an account of Justice Van Devanter privately alerting a reporter of his decision to retire on the morning of the announcement, see “News ‘Beat’ Aided by Van Devanter,” *New York Times*, May 23, 1937, p. 40.
- o. Justice Reed had also been a frontrunner for the 1937 seat that eventually went to Justice Hugo Black. This perhaps explains President Franklin D. Roosevelt’s relatively quick nomination of Reed, despite what many reporters considered to be a surprise retirement announcement from Sutherland. See Robert C. Albright, “Sutherland, 75, Quits U.S. Supreme Court,” *New York Times*, Jan. 6, 1938, p. XI; and Franklyn Waltman, “Stanley F. Reed Named to U.S. Supreme Court.” *New York Times*, Jan. 16, 1938, p. 1.
- p. Although Justice Cardozo had been ill and away from the bench since December 1937 (United Press, “Supreme Court Liberal Succumbs to Heart Ailment in N.Y.,” *Washington Post*, July 10, 1938, p. M1), a definite need to nominate a new Justice did not occur until Cardozo’s death on July 9, 1938.

- q. Justice Brandeis had been away from the bench for a month, recovering from a heart attack, prior to announcing his retirement (United Press, "Justice Brandeis, Dean of Supreme Court, Quits," *Los Angeles Times*, Feb. 14, 1939, p. 1). Nonetheless, his retirement was considered abrupt, suggesting that President Roosevelt had little advance notice to consider a successor.
- r. It is unclear from the historical record whether the President learned of Justice McReynolds's desire to retire by letter, personal conversation, etc.
- s. Although Chief Justice Hughes's retirement due to age and poor health had been "rumored some months" prior to submission of his formal retirement letter (Walter Trohan, "Hughes Retires From Court," *Chicago Daily Tribune*, June 3, 1941, p. 1), the definite need for a new nominee did not arise until Hughes announced his retirement.
- t. Justice Byrnes resigned at President Roosevelt's request on Oct. 3, 1942, becoming Director of Economic Stability. Roosevelt was, therefore, aware of an impending vacancy on the Court prior to the formal resignation, although the precise date is unclear. For a summary of Byrnes's transition from the Court to his new post, see Associated Press, "Byrnes Resigns From Bench in Letter to President," *New York Times*, Oct. 4, 1942, p. 45.
- u. Although President Truman did not announce Justice Roberts's intention to retire until July 5, 1945 (United Press, "Morganthau and Roberts Resign," *Los Angeles Times*, July 6, 1945, p. 1), Justice Roberts's retirement letter is dated July 30, 1945. Truman received the letter on that date "or soon thereafter" (e-mail communication between CRS Information Specialist Dana Ely and Truman Library Archivist Randy Sowell, Sept. 2, 2005).
- v. The Senate took no formal action on the Harlan nomination before the 83<sup>rd</sup> Congress's final adjournment on Dec. 2, 1954. President Eisenhower re-nominated Harlan to the Court on Jan. 10, 1955, five days after the start of the first session of the 84<sup>th</sup> Congress. Evidence does not suggest that another announcement of the nomination was made.
- w. Whether President Eisenhower first learned of Justice Reed's retirement through the press conference or a letter from Reed is unclear. Contemporary media coverage mentioned a press conference and a letter to Eisenhower (Edward T. Folliard, "Reed Is Retiring From High Court," *Washington Post*, Feb. 1, 1957, p. A1). However, political scientist Artemus Ward's account asserts that Reed announced his retirement through a press conference (Ward, *Deciding to Leave*, pp. 162-163). Regardless, both events occurred on Jan. 31, 1957. For the Jan. 31 correspondence between Reed and Eisenhower, see "Letter to Stanley Reed Regarding His Retirement From Active Service as An Associate Justice of the Supreme Court," U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1957* (Washington: GPO, 1958), pp. 109-110.
- x. This information is based on e-mail communication between CRS Information Specialist Dana Ely and Kennedy Library Reference Technician Sharon Kelly, Sept. 14, 2005.
- y. According to a press account, President Kennedy's decision to nominate White "was apparently made just a few hours before the selection was announced Friday night" (on March 30, 1962) (James E. Clayton, "White Was One of Three In Line for High Court," *Washington Post*, Apr. 1, p. A1). Given the relatively quick action, however, Kennedy might have considered White as a Supreme Court candidate in advance of the Mar. 28, 1962, announced vacancy.
- z. Aug. 28, 1962, is the only definitive date which can be established based on available data, as the earliest point at which President Kennedy learned of Justice Frankfurter's intention to retire. However, President Kennedy's quick nomination of Goldberg, and Justice Frankfurter's poor health in the weeks leading up to his retirement, suggest that President Kennedy was considering prospective nominees well before Frankfurter stepped down. Kennedy's letter to Justice Frankfurter accepting his retirement references a visit the President paid to Frankfurter to check on his health sometime during the summer of 1962 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: John F. Kennedy, 1962*, (Washington: GPO, 1963), p. 656). According to Kennedy Library Reference Technician Sharon Kelly, Kennedy's office files suggest that correspondence between Frankfurter, Special Assistant for National Security Affairs McGeorge Bundy, and the President would have alerted Kennedy to Frankfurter's declining health around May 17, 1962 (e-mail communication between CRS Information Specialist Dana Ely and Kennedy Library Reference Technician Sharon Kelly, Sept. 14, 2005).
- aa. President Lyndon B. Johnson unexpectedly nominated Justice Goldberg to be U.S. Ambassador to the United Nations following the death on July 14, 1965, of the previous ambassador, Adlai E. Stevenson. See Carroll Kilpatrick, "Goldberg is Named to Stevenson Post," *Washington Post*, July 21, 1965, p. A1.



- bb. Although Justice Fortas was not nominated until July 28, 1965, President Johnson apparently decided to nominate Fortas long before the Goldberg vacancy, making the gap of only one week between Goldberg's resignation and Fortas's nomination unsurprising. At the press conference announcing Fortas's nomination, President Johnson said that he and Fortas had discussed the nomination "on numerous occasions in the 20 months," (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1966*, vol. 2 (Washington: GPO), 1967, p. 798).
- cc. Despite the fact that Justice Clark announced his forthcoming retirement on Feb. 28, 1967, historical evidence suggests that Johnson might have prompted Clark's retirement as early as Jan. 1967, when the President prepared to nominate Justice Clark's son, Ramsey, to be Attorney General. "On January 25, 1967, Johnson told Ramsey that he could only be named the permanent attorney general if his father stepped down from the Court" (Ward, *Deciding to Leave*, p. 170).
- dd. Like the 1965 Fortas nomination, Marshall's nomination was no surprise, since Johnson was reportedly considering Marshall for appointment to the Court before the formal nomination. According to a 1967 *Washington Post* report, "Marshall's resignation two years ago, at the President's request, from a lifetime seat on the 2d U.S. Circuit Court of Appeals to become Solicitor General, had seemed clearly a move to groom him for the Nation's highest court" (John P. MacKenzie, "LBJ Names Marshall to Court," June 14], 1967, *Washington Post*, p. A1).
- ee. Although President Johnson did not announce Chief Justice Warren's retirement until June 26, he received Warren's retirement letter on June 13, 1968 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 1 (Washington: GPO), 1970, p. 746).
- ff. Although a specific opportunity to name a new Associate Justice did not arise until the Fortas Chief Justice nomination on June 26, 1968, it was reported that "[s]ome Texans at the Capitol are sure that Mr. Johnson has planned for the last four years to name Thornberry to the Supreme Court before he [Johnson] left office," (Richard L. Lyons, "Homer Thornberry: 'Constructive Liberal,' Close LBJ friend," *Washington Post*, June 27, 1969, p. 1).
- gg. Jan. 20, 1969 (the date of Richard M. Nixon's inauguration), is used as the starting date for the vacancy because it marks the beginning of President Nixon's official decision-making powers. After the Abe Fortas Chief Justice nomination failed, President Johnson announced on Oct. 2, 1968, that he would not name another nominee (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 2 (Washington: GPO), 1966, p. 509). Eight days later, Johnson elaborated on his decision. The President wrote that although he would have made another nomination in "ordinary times," the situation was extraordinary and that, "Under the circumstances, the foundations of government would be better served by the present Chief Justice [Earl Warren] remaining [in office] until emotionalism subsides, reason and fairness prevail (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 2 (Washington: GPO, 1970), p. 1024). On Dec. 3, 1968, Chief Justice Warren informed President-elect Richard M. Nixon that he was willing to continue serving until a successor was confirmed ("Statement by the Chief Justice," Dec. 4, 1968, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, DC). In a May 1969, conversation with reporters, President Nixon offered an unusually detailed discussion of his decision-making process surrounding the Burger nomination. Nixon reported that he thought "it would not be a proper mark of respect for the Court and for the Chief Justice to have a nomination go down, say, in February or March, and then have possibly the Senate hearings and the like at a time that the Court was sitting," and that his target date for a nomination decision was between May 1 and June 1, 1968 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Richard Nixon, 1970*, (Washington: GPO), 1971, p. 390).
- hh. Although President Richard M. Nixon waited until Aug. 18, 1969, to nominate Haynsworth, media accounts speculated that Haynsworth would be the nominee at least as early as Aug. 6. See AP, "Possible High Court Choice Hit," *Washington Post*, Aug. 7, 1969, p. B4.
- ii. Chief Justice Warren Burger reportedly "hint[ed] at a possible vacancy" on the Court in a letter to President Gerald Ford on Nov. 10, 1975, and offered "factors for [the President] to consider when appointing a new justice," (e-mail communication between CRS Information Specialist Dana Ely and Ford Library Archivist Technician Joshua Cochran, Sept. 12, 2005). Justice Douglas's health had been in question since Dec. 31, 1974, when he suffered a stroke (John P. MacKenzie, "Douglas Retires From Court," *Washington Post*, Nov. 13, 1975, p. A1). However, President Ford would have had relatively little time to consider a replacement Justice since he did not assume the presidency until Aug. 9, 1975, and a vacancy did not officially arise until Justice Douglas's Nov. 12, 1975 retirement letter.
- jj. During a Nov. 29, 1975, press conference, White House Press Secretary Ron Nessen revealed that the President had decided to nominate, as well as announce his choice of, Stevens the same day (Spencer Rich, "Ford Picks Chicago Jurist," *Washington Post*, Nov. 29, 1975, p. A1). The announcement occurred on Nov. 28, 1975.

- kk. Although Justice Stewart's decision to retire was not made public until June 18, 1981, Stewart delivered a letter, stating his desire to retire, to President Ronald Reagan on May 18, 1981 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1981* (Washington: GPO, 1982), p. 539).
- ll. In this case, the distinction between the dates of announcement of the nominee and the formal nomination is particularly important. On July 7, 1981, President Reagan "announced his intention" to nominate Judge O'Connor upon completion of a required FBI background check (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1981*, (Washington: GPO, 1982), p. 597). President Reagan did not formally nominate her until Aug. 19, 1981, after she had passed the background check.
- mm. Although Chief Justice Burger officially notified President Reagan, by letter on June 17, 1986, of his desire to retire, Burger privately informed Reagan of his plans on May 27, 1986 ("Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist To Be Chief Justice and Antonin Scalia To Be an Associate Justice," U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1986*, vol. 2 (Washington: GPO, 1989), p. 781).
- nn. The May 27, 1986, date is used because Chief Justice Burger's intention to retire (known to President Reagan on May 27) alerted the President of the forthcoming opportunity to elevate Rehnquist from Associate Justice to Chief Justice, and in turn, of the opportunity to nominate someone to succeed Rehnquist as an Associate Justice.
- oo. President Reagan reportedly "had no advance warning of the resignation" (Al Kamen, "Nixon-Appointed Democrat Cites Age, Health," *Washington Post*, June 27, 1987, p. A1).
- pp. Judge Ginsburg withdrew his name from consideration before being officially nominated, but after President Reagan had announced his intention to nominate Ginsburg. Among other controversies surrounding the nomination, Ginsburg admitted shortly before withdrawing that he "had smoked marijuana while a Harvard law professor" (Lou Cannon and Ruth Markus, "Judge Kennedy Likely Choice," *Washington Post*, Nov. 9, 1987, p. A6).
- qq. President George H.W. Bush stated in a July 23, 1990, press conference nominating Souter that he had not decided on a final nominee until that day (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: George Bush, 1990*, vol. 2 (Washington: GPO, 1992), p. 1051).
- rr. On the details of transferring Justice White's retirement letter to the President beginning on Mar. 18, 1993, see Dennis J. Hutchinson, *The Man Who Was Once Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998, p. 437) and Ward, *Deciding to Leave*, p. 183, n. 183. One of Justice White's former law clerks, by then working in the White House, delivered the letter on the Mar. 19, 1993.
- ss. President William J. Clinton announced Ginsburg's nomination on June 14, 1993. However, President Clinton noted in his nomination speech that he asked Ginsburg to accept the nomination on the evening of June 13 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1993*, vol. 1 (Washington: GPO, 1994), p. 843).
- tt. Jan. 1, 1994 is a slight estimation, since Justice Blackmun reportedly "told President Bill Clinton at Renaissance Weekend over the New Year's holiday in Hilton Head, S.C., that this would be his last term (Tony Mauro, "How Blackmun Hid Retirement Plans," *New Jersey Law Journal*, Apr. 25, 1994, p. 18. ). Clinton publicly announced Blackmun's retirement on April 6, 1994. (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1994*, vol. 1 (Washington: GPO, 1995), p. 597).

**Table 2. Duration in Days Between Major Events in the Supreme Court Nomination-and-Confirmation Process, 1900-2006**

| Nominating President | Outgoing Justice                           | Actual or Prospective Vacancy Apparently Became Known to President |   | Nominee               | Number of days elapsed from...     |  |  |  |  |                                      |
|----------------------|--|--|---|-----------------------|------------------------------------|--|--|--|--|--------------------------------------|
|                      |  | When   | How   |                       | Vacancy to nomination announcement | Nomination announcement to first hearing           | First hearing to committee final action            | Committee final action to Senate action      | Nomination announcement to final Senate action | Starting date to final Senate action |
| Theodore Roosevelt   | Horace Gray                                | 09/15/1902   | Death of outgoing Justice   | Oliver Wendell Holmes | 78                                 | No record of hearing                               | No record of hearing                               | 0  | 2  | 80                                   |
| Theodore Roosevelt   | George Shiras, Jr.                         | 08/20/1902 <sup>a</sup>  | Public reports of imminent retirement                                   | William R. Day        | 147                                | No record of hearing                               | No record of hearing                               | 0  | 40   | 187                                  |
| Theodore Roosevelt   | Henry B. Brown                             | 03/08/1906 <sup>b</sup>  | Outgoing Justice notified President of intention to retire <sup>c</sup> | William H. Moody      | 244                                | No record of hearing                               | No record of hearing                               | 2  | 35   | 279                                  |
| William Howard Taft  | Rufus W. Peckham                           | 10/24/1909   | Death of outgoing Justice   | Horace H. Lurton      | 50                                 | No record of hearing                               | No record of hearing                               | 4  | 7  | 59                                   |
| William Howard Taft  | David J. Brewer                            | 03/28/1910   | Death of outgoing Justice   | Charles Evans Hughes  | 28                                 | No record of hearing                               | No record of hearing                               | 0  | 7  | 35                                   |
| William Howard Taft  | Melville W. Fuller<br><i>Chief Justice</i> | 07/04/1910   | Death of outgoing Chief Justice   | Edward D. White       | 161                                | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | Nom. was not referred to Judiciary Committee | 0  | 161                                  |
| William Howard Taft  | Edward D. White                            | 12/12/1910   | White nomination by President to be Chief Justice                       | Willis Van Devanter   | 0                                  | No record of hearing                               | No record of hearing                               | 0  | 3  | 3                                    |
| William              | William H.                                 | 06/15/1910 <sup>d</sup>  | Congressional   | Joseph R.             | 180                                | No record of                                       | No record  | 0  | 3  | 183                                  |

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| Nominating President | Outgoing Justice     | Actual or Prospective Vacancy Apparently Became Known to President |   | Nominee             | Number of days elapsed from...     |  |  |  |  |                                      |
|----------------------|----------------------|--|---|---------------------|------------------------------------|--|--|--|--|--------------------------------------|
|                      |                      | When   | How                                       |                     | Vacancy to nomination announcement | Nomination announcement to first hearing           | First hearing to committee final action            | Committee final action to Senate action            | Nomination announcement to final Senate action | Starting date to final Senate action |
| Howard Taft          | Moody                |  | action authorizing retirement             | Lamar               |                                    | hearing  | of hearing   |  |  |                                      |
| William Howard Taft  | John Marshall Harlan | 10/14/1911   | Death of outgoing Justice                 | Mahlon Pitney       | 128                                | No record of hearing                               | No record of hearing                               | 9  | 23   | 151                                  |
| Woodrow Wilson       | Horace H. Lurton     | 07/12/1914   | Death of outgoing Justice                 | James C. McReynolds | 38                                 | No record of hearing                               | No record of hearing                               | 5  | 10   | 48                                   |
| Woodrow Wilson       | Joseph R. Lamar      | 01/02/1916   | Death of outgoing Justice                 | Louis D. Brandeis   | 26                                 | 12   | 105  | 8  | 125  | 151                                  |
| Woodrow Wilson       | Charles Evans Hughes | 06/10/1916 <sup>e</sup>  | Resignation to pursue political office    | John H. Clarke      | 34                                 | No record of hearing                               | No record of hearing                               | 0  | 10   | 44                                   |
| Warren Harding       | Edward D. White      | 05/19/1921   | Death of outgoing Justice                 | William Howard Taft | 42                                 | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | 0  | 42                                   |
| Warren Harding       | John H. Clarke       | 09/05/1922   | Resignation letter submitted to President | George Sutherland   | 0                                  | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | 0  | 0                                    |
| Warren Harding       | William R. Day       | 09/05/1922 <sup>f</sup>  | Public reports of imminent retirement     | Pierce Butler       | 79                                 | No record of hearing                               | No record of hearing                               | No record of hearing                               | No Senate action                               | No final action                      |
|                      |                      | 12/04/1922   | Lack of action on first                   | Pierce              | 1                                  | No record of                                       | No record  | 3  | 16   | 4                                    |

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| Nominating President  | Outgoing Justice           | Actual or Prospective Vacancy Apparently Became Known to President |   | Nominee                     | Number of days elapsed from...     |  |   |   |  |                                      |  |  |
|-----------------------|----------------------------|--|---|-----------------------------|------------------------------------|--|---|---|--|--------------------------------------|--|--|
|                       |                            | When   | How   |                             | Vacancy to nomination announcement | Nomination announcement to first hearing | First hearing to committee final action | Committee final action to Senate action | Nomination announcement to final Senate action | Starting date to final Senate action |  |  |
| Warren Harding        | Mahlon Pitney              | 12/16/1922   | nomination of Butler<br>White House announced forthcoming retirement <sup>g</sup> | Butler<br>Edward T. Sanford |                                    | hearing                                  | of hearing                              |   |  |                                      |  |  |
| Calvin Coolidge       | Joseph McKenna             | 12/25/1924 <sup>h</sup>  | Public reports of imminent retirement   | Harlan F. Stone             | 11                                 | 23                                       | 5 <sup>h</sup>                          | 3                                       | 31   | 42                                   |  |  |
| Herbert Hoover        | William Howard Taft        | 02/03/1930   | Retirement letter submitted to President  | Charles Evans Hughes        | 0                                  | No record of hearing                     | No record of hearing                    | 3                                       | 10   | 10                                   |  |  |
| Herbert Hoover        | Edward T. Sanford          | 03/08/1930   | Death of outgoing Justice   | John J. Parker              | 13                                 | 15                                       | 16                                      | 16                                      | 47   | 60                                   |  |  |
| Herbert Hoover        | Edward T. Sanford          | 05/07/1930   | Parker nomination rejected by Senate  | Owen J. Roberts             | 2                                  | No record of hearing                     | No record of hearing                    | 1                                       | 11   | 13                                   |  |  |
| Herbert Hoover        | Oliver Wendell Holmes, Jr. | 01/12/1932   | Outgoing Justice notified President of intention to retire                        | Benjamin N. Cardozo         | 34                                 | 4  | 4                                       | 1                                       | 9  | 43                                   |  |  |
| Franklin D. Roosevelt | Willis Van Devanter        | 05/18/1937 <sup>i</sup>  | Retirement letter submitted to President  | Hugo L. Black               | 86                                 | No record of hearing                     | No record of hearing                    | 1                                       | 5  | 91                                   |  |  |

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| Nominating President  | Outgoing Justice                             | Actual or Prospective Vacancy Apparently Became Known to President |   | Nominee            | Number of days elapsed from...     |  |  |  |  |                                      |
|-----------------------|--|--|---|--------------------|------------------------------------|--|--|--|--|--------------------------------------|
|                       |  | When   | How   |                    | Vacancy to nomination announcement | Nomination announcement to first hearing           | First hearing to committee final action            | Committee final action to Senate action            | Nomination announcement to final Senate action | Starting date to final Senate action |
| Franklin D. Roosevelt | George Sutherland                            | 01/05/1938   | Retirement letter submitted to President                                | Stanley F. Reed    | 10                                 | 5  | 4  | 1  | 10   | 20                                   |
| Franklin D. Roosevelt | Benjamin N. Cardozo                          | 07/09/1938 <sup>i</sup>  | Death of outgoing Justice   | Felix Frankfurter  | 180                                | 5  | 6  | 1  | 12   | 192                                  |
| Franklin D. Roosevelt | Louis D. Brandeis                            | 02/13/1939 <sup>k</sup>  | Retirement letter submitted to President                                | William O. Douglas | 35                                 | 4  | 3  | 8  | 15   | 50                                   |
| Franklin D. Roosevelt | Pierce Butler                                | 11/16/1939   | Death of outgoing Justice   | Frank Murphy       | 49                                 | 7  | 4  | 1  | 12   | 61                                   |
| Franklin D. Roosevelt | James C. McReynolds                          | 01/22/1941   | Outgoing Justice notified President of intention to retire <sup>l</sup> | James F. Byrnes    | 141                                | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | Nomination was not referred to Judiciary Committee | 0  | 141                                  |
| Franklin D. Roosevelt | Charles Evans Hughes<br><i>Chief Justice</i> | 06/02/1941 <sup>m</sup>  | Retirement letter submitted to President                                | Harlan F. Stone    | 10                                 | 9  | 2  | 4  | 15   | 25                                   |
| Franklin D. Roosevelt | Harlan F. Stone                              | 06/12/1941   | Stone nomination by President to be Chief Justice                       | Robert H. Jackson  | 0                                  | 9  | 9  | 7  | 25   | 25                                   |
| Franklin D. Roosevelt | James F. Byrnes                              | 10/03/1942 <sup>n</sup>  | Byrnes appointment  | Wiley B. Rutledge  | 100                                | 11   | 10   | 7  | 28   | 128                                  |

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| Nominating President | Outgoing Justice                        | Actual or Prospective Vacancy Apparently Became Known to President |  | Nominee                 | Number of days elapsed from...     |  |   |   |  |  |
|----------------------|---|--|--|-------------------------|------------------------------------|--|---|---|--|--|
|                      |   | When   | How                                      |                         | Vacancy to nomination announcement | Nomination announcement to first hearing | First hearing to committee final action | Committee final action to Senate action | Nomination announcement to final Senate action     | Starting date to final Senate action               |
| Harry S. Truman      | Owen J. Roberts                         | 06/30/1945 <sup>o</sup>  | Retirement letter submitted to President | Harold H. Burton        | 80                                 | No record of hearing                     | No record of hearing                    | 0                                       | 1  | 81   |
| Harry S. Truman      | Harlan F. Stone<br><i>Chief Justice</i> | 04/22/1946   | Death of outgoing Chief Justice          | Fred M. Vinson          | 45                                 | 8  | 5                                       | 1                                       | 14   | 59   |
| Harry S. Truman      | Frank Murphy                            | 07/19/1949   | Death of outgoing Justice                | Thomas C. Clark         | 9                                  | 12                                       | 3                                       | 6                                       | 21   | 30   |
| Harry S. Truman      | Wiley B. Rutledge                       | 09/10/1949   | Death of outgoing Justice                | Sherman Minton          | 5                                  | 12                                       | 6                                       | 1                                       | 19   | 24   |
| Dwight D. Eisenhower | Fred M. Vinson<br><i>Chief Justice</i>  | 09/08/1953   | Death of outgoing Chief Justice          | Earl Warren             | 24                                 |  |   | <i>Recess appointment, 10/02/1953</i>   |  |  |
| Dwight D. Eisenhower | Robert H. Jackson                       | 10/09/1954   | Death of outgoing Justice                | John Marshall Harlan II | 30                                 | No record of hearing                     | No record committee action              | No record of committee action           | No record of final action after committee referral | No record of final action after committee referral |
| Dwight D. Eisenhower | Sherman Minton                          | 09/07/1956   | Retirement letter submitted to President | William J. Brennan      | 38                                 |  |   | <i>Recess appointment, 10/15/1956</i>   |  |  |
| Dwight D.            | Stanley F.                              | 01/31/1957   | Press                                    | Charles E.              | 30                                 | 16                                       | 0                                       | 1                                       | 17   | 47   |

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| Nominating President | Outgoing Justice                    | Actual or Prospective Vacancy Apparently Became Known to President |   | Nominee            | Number of days elapsed from...     |  |   |   |  |                                      |                                       |
|----------------------|-------------------------------------|--|---|--------------------|------------------------------------|--|---|---|--|--------------------------------------|---------------------------------------|
|                      |                                     | When   | How   |                    | Vacancy to nomination announcement | Nomination announcement to first hearing | First hearing to committee final action | Committee final action to Senate action | Nomination announcement to final Senate action | Starting date to final Senate action |                                       |
| Eisenhower           | Reed                                |  | conference held by Reed announcing retirement <sup>r</sup>              | Whittaker          |                                    |  |   |   |  |                                      |                                       |
| Dwight D. Eisenhower | Harold H. Burton                    | 10/06/1958   | Retirement letter submitted to President                                | Potter Stewart     | 8<br>103 <sup>s</sup>              | 82                                       | 11                                      | 15                                      | 108  | 211                                  | <i>Recess appointment, 10/14/1958</i> |
| John F. Kennedy      | Charles E. Whittaker                | 03/28/1962   | Retirement letter received by President <sup>t</sup>                    | Byron R. White     | 2                                  | 12                                       | 0                                       | 0                                       | 12   | 14                                   |                                       |
| John F. Kennedy      | Felix Frankfurter                   | 08/28/1962 <sup>u</sup>  | Retirement letter submitted to President                                | Arthur J. Goldberg | 1                                  | 13                                       | 14                                      | 0                                       | 27   | 28                                   |                                       |
| Lyndon B. Johnson    | Arthur J. Goldberg                  | 07/20/1965   | Goldberg appointment to other public office <sup>v</sup>                | Abe Fortas         | 8                                  | 8  | 5                                       | 1                                       | 14   | 22                                   |                                       |
| Lyndon B. Johnson    | Thomas C. Clark                     | 02/28/1967   | Outgoing Justice notified President of intention to retire <sup>w</sup> | Thurgood Marshall  | 105                                | 30                                       | 21                                      | 27                                      | 78   | 183                                  |                                       |
| Lyndon B. Johnson    | Earl Warren<br><i>Chief Justice</i> | 06/13/1968 <sup>x</sup>  | Retirement letter submitted to President                                | Abe Fortas         | 13                                 | 15                                       | 68                                      | 14                                      | 97   | 110                                  |                                       |
| Lyndon B. Johnson    | Abe Fortas                          | 06/26/1968 <sup>y</sup>  | Fortas nomination by  | Homer Thornberry   | 0                                  | 15                                       | No record of                            | No record of final                      | Nomination withdrawn by                        | Nomination withdrawn                 |                                       |

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| Nominating President | Outgoing Justice                    | Actual or Prospective Vacancy Apparently Became Known to President |  | Nominee                    | Number of days elapsed from...     |  |   |   |  |                                      |
|----------------------|-------------------------------------|--|--|----------------------------|------------------------------------|--|---|---|--|--------------------------------------|
|                      |                                     | When   | How  |                            | Vacancy to nomination announcement | Nomination announcement to first hearing | First hearing to committee final action | Committee final action to Senate action | Nomination announcement to final Senate action | Starting date to final Senate action |
| Richard M. Nixon     | Earl Warren<br><i>Chief Justice</i> | 01/20/1969 <sup>z</sup>  | Johnson to be Chief Justice  | Warren E. Burger           | 121                                | 13                                       | committee vote                          | committee action                        | President (10/04/1968)                         | by President                         |
| Richard M. Nixon     | Abe Fortas                          | 05/14/1969   | Fortas Chief Justice nomination withdrawn by President (10/4/1968) | Clement F. Haynsworth, Jr. | 96                                 | 29                                       | 23                                      | 43                                      | 95   | 191                                  |
|                      |                                     | 11/21/1969   | Resignation letter submitted to President                          | G. Harrold Carswell        | 59                                 | 8  | 20                                      | 51                                      | 79   | 138                                  |
|                      |                                     | 04/08/1970   | Haynsworth nomination rejected by Senate                           | Harry A. Blackmun          | 6                                  | 15                                       | 7                                       | 6                                       | 28   | 34                                   |
| Richard M. Nixon     | Hugo L. Black                       | 09/17/1971   | Carswell nomination rejected by Senate                             | Lewis F. Powell, Jr.       | 34                                 | 13                                       | 20                                      | 13                                      | 46   | 80                                   |
| Richard M. Nixon     | John Marshall Harlan II             | 09/23/1971   | Retirement letter submitted to President                           | William H. Rehnquist       | 28                                 | 13                                       | 20                                      | 17                                      | 50   | 78                                   |
| Gerald R. Ford       | William O. Douglas                  | 11/12/1975 <sup>aa</sup>   | Retirement letter  | John Paul Stevens          | 16                                 | 10                                       | 3                                       | 6                                       | 19   | 35                                   |

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| Nominating President | Outgoing Justice                         | Actual or Prospective Vacancy Apparently Became Known to President |  | Nominee              | Number of days elapsed from...     |  |   |   |  |                                      |
|----------------------|--|--|--|----------------------|------------------------------------|--|---|---|--|--------------------------------------|
|                      |  | When   | How  |                      | Vacancy to nomination announcement | Nomination announcement to first hearing | First hearing to committee final action                                 | Committee final action to Senate action | Nomination announcement to final Senate action | Starting date to final Senate action |
| Ronald Reagan        | Potter Stewart                           | 05/18/1981 <sup>bbb</sup>  | submitted to President<br>Retirement letter submitted to President | Sandra Day O'Connor  | 50                                 | 64                                       | 6   | 6                                       | 76   | 126                                  |
| Ronald Reagan        | Warren E. Burger<br><i>Chief Justice</i> | 05/27/1986 <sup>cc</sup>   | Justice privately alerted President of intention to retire         | William H. Rehnquist | 21                                 | 42                                       | 16  | 34                                      | 92   | 113                                  |
| Ronald Reagan        | William H. Rehnquist                     | 05/27/1986 <sup>dd</sup>   | Rehnquist nomination by Reagan to be Chief Justice                 | Antonin Scalia       | 21                                 | 49                                       | 9   | 34                                      | 92   | 113                                  |
| Ronald Reagan        | Lewis F. Powell, Jr.                     | 06/26/1987 <sup>ee</sup>   | Press conference held by Powell announcing retirement              | Robert H. Bork       | 5                                  | 76                                       | 21  | 17                                      | 114  | 119                                  |
|                      |  | 10/23/1987   | Bork nomination rejected by Senate                                 | Douglas H. Ginsburg  | 6                                  |  | Ginsburg withdrew (11/07/1987) before official nomination <sup>ff</sup> |   |  |                                      |
|                      |  | 11/07/1987   | Ginsburg withdrawal  | Anthony M. Kennedy   | 4                                  | 33                                       | 44  | 7                                       | 84   | 88                                   |
| George H. W. Bush    | William J. Brennan                       | 07/20/1990   | Retirement letter submitted to                                     | David H. Souter      | 3                                  | 52                                       | 14  | 5                                       | 71   | 74                                   |

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| Nominating President | Outgoing Justice     | Actual or Prospective Vacancy Apparently Became Known to President |  | Nominee              | Number of days elapsed from...     |   |   |   |  |                                      |
|----------------------|----------------------|--|--|----------------------|------------------------------------|---|---|---|--|--------------------------------------|
|                      |                      | When   | How  |                      | Vacancy to nomination announcement | Nomination announcement to first hearing  | First hearing to committee final action | Committee final action to Senate action | Nomination announcement to final Senate action | Starting date to final Senate action |
| George H. W. Bush    | Thurgood Marshall    | 06/27/1991   | Retirement letter submitted to President                                     | Clarence Thomas      | 4                                  | 71  | 17                                      | 18                                      | 106  | 110                                  |
| William J. Clinton   | Byron R. White       | 03/19/1993 <sup>gg</sup>   | Retirement letter submitted to President                                     | Ruth Bader Ginsburg  | 87                                 | 36  | 9                                       | 5                                       | 50   | 137                                  |
| William J. Clinton   | Harry A. Blackmun    | 01/01/1994 <sup>hh</sup>   | Justice privately alerted President  | Stephen G. Breyer    | 132                                | 60  | 7                                       | 10                                      | 77   | 209                                  |
| George W. Bush       | Sandra Day O'Connor  | 07/01/2005   | Retirement letter submitted to President                                     | John G. Roberts      | 18                                 | Nomination withdrawn by President (09/05/2005) before the first Judiciary Committee hearing; re-nominated as Chief Justice (09/05/2005) |   |   |  |                                      |
|                      |                      | 09/05/2005   | Announcement of Roberts nomination withdrawal and re-submission by President | Harriet Miers        | 28                                 | Miers withdrew as nominee (10/27/2005) before the start of Judiciary Committee hearings   |   |   |  |                                      |
|                      |                      | 10/27/2005   | Announcement of Miers withdrawal   | Samuel A. Alito, Jr. | 4                                  | 70  | 15                                      | 7                                       | 92   | 96                                   |
| George W. Bush       | William H. Rehnquist | 09/03/2005   | Death of outgoing Justice  | John G. Roberts      | 2                                  | 7   | 10                                      | 7                                       | 24   | 26                                   |

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**Sources:** Durations for major intervals in the nomination-and-confirmation process were computed by the CRS authors. As described in the text, this research relied on historical newspapers, official presidential papers, and CRS correspondence with Presidential Libraries. Ward's *Deciding to Leave* was especially useful in compiling data on the reasons why Justices left the bench. Additional source information appears in the table notes below.

- a. It is unclear when President Theodore Roosevelt learned of Justice Shiras's intention to retire. However, *Washington Post* coverage suggests that Shiras's forthcoming departure was well known in Washington by at least Aug. 20, 1902 ("Knox May Not Want It: Belief that He Would Decline Justice Shiras' Position," *Washington Post*, Aug. 20, 1902, p. 1).
- b. According to the *Washington Post*, Justice Brown notified the President, on Mar. 8, 1906, that he wished to retire ("To Leave the Bench: Justice Brown Will Retire in the Fall," *Washington Post*, Mar. 8, 1906, p. 3).
- c. It is unclear from the historical record whether the President learned of Justice Brown's desire to retire by letter, personal conversation, etc.
- d. Justice Moody did not actually depart the Court until Nov. 20, 1910 (Ward, *Deciding to Leave*, p. 5). However, "Illness of a serious nature has kept Justice Moody from his duties in the Supreme Court for almost a year. There have been occasional rumors of retirement, but Senator Lodge [on June 15, 1910] presented the real harbinger of that action, in the form of a bill extending the statute relating to retirement from the Supreme Court to cover the case of Mr. Moody" ("Moody Will Retire," *Washington Post*, June 15, 1910, p. 1).
- e. On June 10, 1916, Justice Hughes resigned to pursue the 1916 Republican presidential nomination ("Hughes, With Words That Ring, Obeys Call to Lead Republicans," *Washington Post*, June 11, 1916, p. 1). Although historical media research does not indicate that President Wilson knew for certain that Justice Hughes would resign, media reports had hinted at a Hughes resignation throughout the spring of 1916.
- f. Day did not leave the Court until Nov. 13, 1922. However, the *Washington Post* reported that Day's consideration of retirement was mentioned at a White House briefing on Sept. 5, 1922 ("Justice Day May Leave the Bench," *Washington Post*, Sept. 6, 1922, p. 1).
- g. Although Justice Pitney's resignation was effective as of Dec. 31, 1922, the White House announced Pitney's forthcoming departure on Dec. 16, 1922 ("Resigns," *Chicago Daily Tribune*, Dec. 17, 1922, p. 17).
- h. Justice McKenna did not officially retire until Jan. 5, 1925. However, the media reported his imminent retirement on Dec. 25, 1924 ("M'Kenna to Retire Soon as a Justice of the Supreme Court," *Washington Post*, Dec. 25, 1924, p. 2). Duration calculations for final Senate action on Stone are based on the Feb. 5, 1925, confirmation date shown in **Table I**, not the Jan. 26, 1925, recommittal.
- i. For an account of Justice Van Devanter privately alerting a reporter of his decision to retire on the morning of the announcement, see "News 'Beat' Aided by Van Devanter," *New York Times*, May 23, 1937, p. 40.
- j. Although Justice Cardozo had been ill and away from the bench since December 1937 (United Press, "Supreme Court Liberal Succumbs to Heart Ailment in N.Y.," *Washington Post*, July 10, 1938, p. M1), a definite need to nominate a new Justice did not occur until Cardozo's death on July 9, 1938.
- k. Justice Brandeis had been away from the bench for a month, recovering from a heart attack, prior to announcing his retirement (United Press, "Justice Brandeis, Dean of Supreme Court, Quits," *Los Angeles Times*, Feb. 14, 1939, p. 1). Nonetheless, his retirement was considered abrupt, suggesting that President Roosevelt had little advance notice to consider a successor.
- l. It is unclear from the historical record whether the President learned of Justice McReynolds's desire to retire by letter, personal conversation, etc.
- m. Although Chief Justice Hughes's retirement due to age and poor health had been "rumored some months" prior to submission of his formal retirement letter (Walter Trohan, "Hughes Retires From Court," *Chicago Daily Tribune*, June 3, 1941, p. 1), the definite need for a new nominee did not arise until Hughes announced his retirement.

- n. Justice Byrnes resigned at President Roosevelt's request on Oct. 3, 1942, becoming Director of Economic Stability. Roosevelt was, therefore, aware of an impending vacancy on the Court prior to the formal resignation, although the precise date is unclear. For a summary of Byrnes's transition from the Court to his new post, see Associated Press, "Byrnes Resigns From Bench in Letter to President," *New York Times*, Oct. 4, 1942, p. 45.
- o. Although President Truman did not announce Justice Roberts's intention to retire until July 5, 1945 (United Press, "Morganthau and Roberts Resign," *Los Angeles Times*, July 6, 1945, p. 1), Justice Roberts's retirement letter is dated June 30, 1945. Truman received the letter on that date "or soon thereafter" (e-mail communication between CRS Information Specialist Dana Ely and Truman Library Archivist Randy Sowell, Sept. 2, 2005).
- p. Congress was not in session when Chief Justice Vinson died on Sept. 8, 1953 (U.S. Congress, Joint Committee on Printing, *2003-2004 Official Congressional Directory: 108<sup>th</sup> Congress* (Washington: GPO), p. 519). President Eisenhower recess-appointed Earl Warren as Chief Justice on Oct. 2, 1953 and nominated him to the Court, on Jan. 11, 1954, after Congress reconvened for the second session of the 83<sup>rd</sup> Congress. Therefore, although the interval between the starting date (Sept. 8, 1953, as shown in **Table 1**) and announcement date (Jan. 11, 1954) is 125 days, and the entire interval from the starting date until final Senate action (Mar. 1, 1954) is 174 days, the President's actual decision-making timetable could also be classified as 24 days, or the interval between Vinson's death (Sept. 8, 1953) and Eisenhower's recess appointment of Chief Justice Warren (Oct. 2, 1953). Both intervals are used to calculate the median elapsed time from vacancy to nomination announcement. Nonetheless, the long intervals have a minimal impact on computing the median durations between stages in the process because the median is less sensitive than the mean to extremely high or low values.
- q. Congress was not in session when Justice Minton submitted his retirement letter to the President on Sept. 7, 1956 (U.S. Congress, Joint Committee on Printing, *2003-2004 Official Congressional Directory: 108<sup>th</sup> Congress*, (Washington: GPO), p. 519). President Eisenhower recess-appointed William J. Brennan as Associate Justice on Oct. 15, 1956, and nominated him to the Court, on Jan. 14, 1957, after Congress convened for the first session of the 85<sup>th</sup> Congress. Therefore, although the interval between the starting date (Sept. 7, 1956, as shown in **Table 1**) and announcement date (Jan. 14, 1957) is 129 days, and the entire interval from the starting date until final Senate action (Mar. 19, 1957) is 193 days, the President's actual decision-making timetable could also be classified as 38 days, or the interval between Brennan's retirement announcement (Sept. 7, 1956) and Eisenhower's recess appointment of Justice Brennan (Oct. 15, 1956). Both intervals are used to calculate the median elapsed time from vacancy to nomination announcement. Nonetheless, the long intervals have a minimal impact on computing the median durations between stages in the process because the median is less sensitive than the mean to extremely high or low values.
- r. Whether President Eisenhower first learned of Justice Reed's retirement through the press conference or a letter from Reed is unclear. Contemporary media coverage mentioned a press conference and a letter to Eisenhower (Edward T. Folliard, "Reed Is Retiring From High Court," *Washington Post*, Feb. 1, 1957, p. A1). However, political scientist Artemus Ward's account asserts that Reed announced his retirement through a press conference (Ward, *Deciding to Leave*, pp. 162-163). Regardless, both events occurred on Jan. 31, 1957. For the Jan. 31 correspondence between Reed and Eisenhower, see "Letter to Stanley Reed Regarding His Retirement From Active Service as An Associate Justice of the Supreme Court," U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1957* (Washington: GPO, 1958), pp. 109-110.
- s. Congress was not in session when Burton submitted his retirement letter to the President on Oct. 6, 1958 (U.S. Congress, Joint Committee on Printing, *2003-2004 Official Congressional Directory: 108<sup>th</sup> Congress* (Washington: GPO), p. 519). President Eisenhower recess-appointed Potter Stewart as Associate Justice on Oct. 14, 1958, and nominated him to the Court, on Jan. 17, 1959, after Congress convened for the first session of the 86<sup>th</sup> Congress. Therefore, although the interval between the starting date (Oct. 6, 1958, as shown in **Table 1**) and nomination date (Jan. 17, 1959) is 103 days, and the entire interval from the starting date until final Senate action (May 5, 1959) is 211 days, the President's actual decision-making timetable could also be classified as eight days, or the interval between Burton's retirement announcement (Oct. 6, 1958) and Eisenhower's recess appointment of Justice Stewart (Oct. 14, 1958). Both intervals are used to calculate the median elapsed time from vacancy to nomination announcement. Nonetheless, the long intervals have a minimal impact on computing the median durations between stages in the process because the median is less sensitive than the mean to extremely high or low values.
- t. This information is based on e-mail communication between CRS Information Specialist Dana Ely and Kennedy Library Reference Technician Sharon Kelly, Sept. 14, 2005.
- u. Aug. 28, 1962, is the only definitive date which can be established based on available data, as the earliest point at which President Kennedy learned of Justice Frankfurter's intention to retire. However, President Kennedy's quick nomination of Goldberg, and Justice Frankfurter's poor health in the weeks leading up to his

retirement, suggest that President Kennedy was considering prospective nominees well before Frankfurter stepped down. Kennedy's letter to Justice Frankfurter accepting his retirement references a visit the President paid to Frankfurter to check on his health sometime during the summer of 1962 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: John F. Kennedy, 1962*, (Washington: GPO, 1963), p. 656). According to Kennedy Library Reference Technician Sharon Kelly, Kennedy's office files suggest that correspondence between Frankfurter, Special Assistant for National Security Affairs McGeorge Bundy, and the President would have alerted Kennedy to Frankfurter's declining health around May 17, 1962 (e-mail communication between CRS Information Specialist Dana Ely and Kennedy Library Reference Technician Sharon Kelly, Sept. 14, 2005).

- v. President Lyndon B. Johnson unexpectedly nominated Justice Goldberg to be U.S. Ambassador to the United Nations following the death on July 14, 1965, of the previous ambassador, Adlai E. Stevenson. See Carroll Kilpatrick, "Goldberg is Named to Stevenson Post," *Washington Post*, July 21, 1965, p. A1.
- w. Despite the fact that Justice Clark announced his forthcoming retirement on Feb. 28, 1967, historical evidence suggests that Johnson might have prompted Clark's retirement as early as Jan. 1967, when the President prepared to nominate Justice Clark's son, Ramsey, to be Attorney General. "On January 25, 1967, Johnson told Ramsey that he could only be named the permanent attorney general if his father stepped down from the Court" (Ward, *Deciding to Leave*, p. 170).
- x. Although President Johnson did not announce Chief Justice Warren's retirement until June 26, he received Warren's retirement letter on June 13, 1968 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 1 (Washington: GPO, 1966), p. 746).
- y. Although a specific opportunity to name a new Associate Justice did not arise until the Fortas Chief Justice nomination on June 26, 1968, it was reported that "[s]ome Texans at the Capitol are sure that Mr. Johnson has planned for the last four years to name Thornberry to the Supreme Court before he [Johnson] left office," (Richard L. Lyons, "Homer Thornberry: 'Constructive Liberal,' Close [B] friend," *Washington Post*, June 27, 1969, p. 1).
- z. Jan. 20, 1969 (the date of Richard M. Nixon's inauguration), is used as the starting date for the vacancy because it marks the beginning of President Nixon's official decision-making powers. After the Abe Fortas Chief Justice nomination failed, President Johnson announced on Oct. 2, 1968, that he would not name another nominee (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 2 (Washington: GPO, 1966), p. 509). Eight days later, Johnson elaborated on his decision. The President wrote that although he would have made another nomination in "ordinary times," the situation was extraordinary and that, "Under the circumstances, the foundations of government would be better served by the present Chief Justice [Earl Warren] remaining [in office] until emotionalism subsides, reason and fairness prevail (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 2 (Washington: GPO, 1970), p. 1024). On Dec. 3, 1968, Chief Justice Warren informed President-elect Richard M. Nixon that he was willing to continue serving until a successor was confirmed ("Statement by the Chief Justice," Dec. 4, 1968, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, DC). In a May 1969, conversation with reporters, President Nixon offered an unusually detailed discussion of his decision-making process surrounding the Burger nomination. Nixon reported that he thought "it would not be a proper mark of respect for the Court and for the Chief Justice to have a nomination go down, say, in February or March, and then have possibly the Senate hearings and the like at a time that the Court was sitting," and that his target date for a nomination decision was between May 1 and June 1, 1968 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Richard Nixon, 1970*, (Washington: GPO, 1971), p. 390).
- aa. Chief Justice Warren Burger reportedly "hint[ed] at a possible vacancy" on the Court in a letter to President Gerald Ford on Nov. 10, 1975, and offered "factors for [the President] to consider when appointing a new justice" (e-mail communication between CRS Information Specialist Dana Ely and Ford Library Archivist Technician Joshua Cochran, Sept. 12, 2005). Justice Douglas's health had been in question since Dec. 31, 1974, when he suffered a stroke (John P. MacKenzie, "Douglas Retires From Court," *Washington Post*, Nov. 13, 1975, p. A1). However, President Ford would have had relatively little time to consider a replacement Justice since he did not assume the presidency until Aug. 9, 1975, and a vacancy did not officially arise until Justice Douglas's Nov. 12, 1975 retirement letter.
- bb. Although Justice Stewart's decision to retire was not made public until June 18, 1981, Stewart delivered a letter, stating his desire to retire, to President Ronald Reagan on May 18, 1981 (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1981* (Washington: GPO, 1982), p. 539).
- cc. Although Chief Justice Burger officially notified President Reagan of his desire to retire, by letter on June 17, 1986, Burger privately informed Reagan of his plans on May 27, 1986 ("Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist To Be Chief Justice and

Antonin Scalia To Be an Associate Justice,” U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: Ronald Reagan, 1986*, vol. 2 (Washington: GPO, 1989), p. 781).

- dd. The May 27, 1986, date is used because Chief Justice Burger’s intention to retire (known to President Reagan on May 27) alerted the President of the forthcoming opportunity to elevate Rehnquist from Associate Justice to Chief Justice, and in turn, of the opportunity to nominate someone to succeed Rehnquist as an Associate Justice.
- ee. President Reagan reportedly “had no advance warning of the resignation” (Al Kamen, “Nixon-Appointed Democrat Cites Age, Health,” *Washington Post*, June 27, 1987, p. A1).
- ff. Judge Ginsburg withdrew his name from consideration before being officially nominated, but after President Reagan had announced his intention to nominate Ginsburg. Among other controversies surrounding the nomination, Ginsburg admitted shortly before withdrawing that he “had smoked marijuana while a Harvard law professor” (Lou Cannon and Ruth Markus, “Judge Kennedy Likely Choice,” *Washington Post*, Nov. 9, 1987, p. A6).
- gg. On the details of transferring Justice White’s retirement letter to the President beginning on Mar. 18, 1993, see Dennis J. Hutchinson, *The Man Who Was Once Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998, p. 437) and Ward, *Deciding to Leave*, p. 183, n. 183. One of Justice White’s former law clerks, by then working in the White House, delivered the letter on the Mar. 19, 1993.
- hh. Jan. 1, 1994, is an estimation, since Justice Blackmun reportedly “told President Bill Clinton at Renaissance Weekend over the New Year’s holiday in Hilton Head, S.C., that this would be his last term (Tony Mauro, “How Blackmun Hid Retirement Plans,” *New Jersey Law Journal*, Apr. 25, 1994, p. 18. ). Clinton publicly announced Blackmun’s retirement on April 6, 1994. (U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1994*, vol. 1 (Washington: GPO), 1995, p. 597).

**Table 3. Median Duration in Days Between Major Events in the Supreme Court Nomination-and-Confirmation Process, 1900-2006**

| Time period | Median number of days elapsed from ... <sup>a</sup>                                      |  |   |   |  |  |
|-------------|--|--|---|---|--|--|
|             | President Apparently Learned of Actual or Prospective Vacancy to Nomination Announcement | Nomination Announcement to First Hearing | First Hearing to Committee Final Action | Committee Final Action to Final Senate Action | Nomination Announcement to Final Senate Action | President Apparently Learned of Actual or Prospective Vacancy to Final Senate Action |
| 1900-1980   | 34   | 12.5                                     | 6                                       | 3   | 17   | 59   |
| 1981-2006   | 12   | 52                                       | 14                                      | 7   | 84   | 113  |
| 1900-2006   | 28   | 15                                       | 9                                       | 5   | 22   | 76   |

**Sources:** Durations for major intervals in the nomination-and-confirmation process were computed by the CRS authors. As described in the text, this research relied on historical newspapers, official presidential papers, and CRS correspondence with Presidential Libraries. Artemus Ward’s, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State University of New York Press, 2003) was especially useful in compiling data on the reasons why Justices left the bench.

**Note:** For a listing of all Supreme Court nominations made during the 1900-2006 period and, for each nomination, the dates of the “major events” accounted for in the columns in **Table 3**, see the preceding **Table 1**. For a listing, for each nomination, of the duration in days between major events in the Supreme Court nomination-and-confirmation process, see **Table 2**.

- a. In **Table 3**, the median amount of time from vacancy to final Senate action within each time period does not necessarily equal the sum of the medians for each stage in the nomination-and-confirmation process. Likewise, the median length of time for all Senate actions (i.e., from nomination announcement to final Senate action) within each time period does not equal the sum of the medians for each stage. The median identifies the mid-point for individual sets of observations. Because each stage of the process can have a different number of observations, and because the data are also not a “normal” (i.e., “bell-shaped”) distribution, the sum of the medians for individual stages generally is not equal to the median for the entire period. For more information, see chapter 4 in Ya-lun Chou, *Statistical Analysis for Business and Economics* (New York: Elsevier, 1989). Due to updated data in **Table 1** and **Table 2**, some of the summary statistics in **Table 3** have changed from previous versions of this report. This version of the report does not include, when calculating the interval for total Senate action (nomination announcement to final Senate action), cases in which nominations lingered in the Senate, but on which the Senate took no final vote (e.g., the nomination was withdrawn, recommitted, etc.). If the Judiciary Committee held hearings or held a final vote, those dates are included in median calculations.

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