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Supreme Numbers

High Court nominations and confirmations in historic perspective.

By Gleaves Whitney

Forty-two men have served as president of the United States; 39 of them have had the opportunity to nominate an individual to the U.S. Supreme Court. Even James Garfield, succumbing to an assassin's bullet just 200 days after his inauguration, had the satisfaction of knowing his nominee was confirmed by the Senate.

George W. Bush must have wondered why he had to wait so long to fulfill his constitutional duty. History has denied only a troika of presidents a Supreme Court nomination. Two of the Supreme-less, William Henry Harrison and Zachary Taylor, were Whigs who died before serving out their terms. The most recent of the Supreme-less, Jimmy Carter, died politically after losing a four-year battle with malaise.

George W. Bush has served one complete term and then some, and until last Friday no opening on the High Court had been announced. Indeed, he's had to gut it out longer than any other president since James Monroe. President Bush had to bide his time for four and a half years. If he thinks that's bad, he should remember that our fifth president waited more than six and a half years — and that, during the Era of Good Feelings.

What about the total number of Supreme Court nominees who have come before the Senate? Since 1789, when George Washington was in his first year in office, presidents have made some 148 nominations to the court. Historically, four of every five nominees has gotten through the U.S. Senate successfully. That means 20 percent have not, so it's hardly a slam-dunk.

[For a variety of reasons](#), 32 of the 148 nominations — about 1 in 12 — were unsuccessful: 6 individuals declined or withdrew themselves; 9 nominees were withdrawn by the president; 5 nominations lapsed because the Senate did not act on them; and a couple died before they could take their place on the bench. But the main explanation for unsuccessful nominations was rejection by the Senate; 12 individuals were nixed in the august house

In this cynical age, many people expect George W. Bush to fail to get one or more nominees through the Senate. Actually he has plenty of historical company. Ten presidents had one or more Supreme Court nominees rejected. It happened to no less than George Washington and James Madison.

Republican nominees compared to Democratic nominees

No doubt about it, history has been kinder to the GOP than to the Democrats when it comes to getting the most Supreme Court nominees confirmed. Starting with Jackson in 1829, Democratic presidents have had 38 of 47 nominees (81 percent) confirmed by the Senate. Starting with Lincoln in 1861, Republican presidents have had 52 of 62 nominees (84 percent) confirmed by the Senate. Even though the Democratic party is a generation older, it is striking how many more times GOP presidents have had the opportunity to make Supreme Court nominations, and how much better their track record is for getting their nominees confirmed.

It's the luck of the historical draw. Some of President Bush's Republican predecessors were extremely successful even after a period in office that's been shorter than Bush's. Within four years, William

Howard Taft was able to take satisfaction in six successful nominations to the Supreme Court; Abraham Lincoln in five; Benjamin Harrison, Warren Harding, and Richard Nixon in four; Ulysses S. Grant and Herbert Hoover in three; and Dwight Eisenhower and George H. W. Bush in two.

What about the length of time between a president's nomination and the Senate's confirmation or other decisive action? Looking at the experience of the Founders, we see that every Founding Father who became president — Washington, Adams, Jefferson, Madison, and Monroe — had an answer from the Senate within ten days (even when the nominee was rejected). The majority of nominees were acted upon within one week; several, within the same day.

Committee Circus

What changed? One variable that eroded the efficacy between the branches was the Senate hearing. Prior to 1925, Supreme Court nominees were not expected to be grilled by a committee. A senator from the nominee's home state would vouch for the nominated individual, and that would usually suffice for speedy confirmation.

It was a different era then; a balmier political climate prevailed. Nominees could almost treat the Senate cavalierly and get away with it. As recently as 1949 Truman's nominee, Sherman Minton, refused to appear before the Senate Judiciary Committee when summoned to do so. In the 1930s as a Senate leader (and seat-mate of Harry Truman's) Minton had been a staunch supporter of Franklin Roosevelt's efforts to pack the Supreme Court with more liberal justices. A decade later, the Senate wanted to know if he still believed in Court packing, so the Judiciary Committee decided to bring him in for questioning. Minton refused on the grounds that as a Senate leader in the 1930s, he'd had the right to champion his party's views to the full extent possible; but now, as a federal judge, he was no longer a player but a referee. The committee bought their former colleague's argument. They withdrew their request and the Senate confirmed his appointment.

Minton was able to draw on more than a century of custom to justify his refusal to testify: Until the 1920s, nominees were not referred to a committee, nor were they expected to answer to the Judiciary Committee.

[According to Yale law professor Stephen Carter](#), confirmation hearings only became a fixture of the Senate in the 1950s, when the southern Democrats who controlled the Senate Judiciary Committee required presidential nominees to appear before them and be queried about their views of *Brown v. Board of Education*.

Tough Times for Republican Nominees

In the 20th century, several Republican nominees have had rough going in the Senate. The first was a North Carolinian named John Parker. When a spot opened up on the Supreme Court in 1930, President Herbert Hoover nominated Parker, who had sat on the Court of Appeals for five years. But Parker was vigorously opposed by labor groups and the NAACP, which keyed in on remarks he had made a decade earlier about blacks when he had been stumping for governor of North Carolina. Parker narrowly lost in the Senate, in a 41-to-39 vote. (We shouldn't feel too bad for Hoover; three of his nominees to the High Court were confirmed.)

In recent decades, there have been notable episodes of Senate rejection of Republican nominees. The first occurred in 1969, when two Nixon nominees, Clement Haynsworth and Harold Carswell, were

rejected because of their stand on civil rights. (By the way, the nominee who made it through was Harry Blackmun, the lead author of *Roe v. Wade*.)

It happened again in 1987, when two Reagan picks, Robert Bork and Douglas Ginsberg, had to be scuttled; the nominee who was not "borked" was Anthony Kennedy.

It almost happened again in 1991, when George H. W. Bush nominee Clarence Thomas was accused by Anita Hill of sexual harassment. Surviving "a high-tech lynching," he narrowly won confirmation.

Not-So-Tough for Clinton

What happened the last couple of times a president had the opportunity to nominate someone to the U.S. Supreme Court? It is helpful to examine President Bill Clinton's experience, for he had two such opportunities, in 1993 and 1994. Since in the first two years of his first term he was working with a Democratic majority in the Senate, both nominations went relatively smoothly. Upon the retirement of Justice Byron White, Clinton nominated Ruth Bader Ginsburg on June 22, 1993; she was confirmed by the Senate six weeks later, on August 3, 1993, by a 96-3 vote. Ginsburg is hardly considered a centrist.

The Coming Confirmation Battle

A year later another opening occurred when Justice Harry Blackmun retired. President Clinton nominated [Stephen Breyer](#) on May 14, 1994, who easily won confirmation, 87-9. As the Supreme Court Historical Society observes, "the discussion focused not on whether he would be confirmed, but on what kind of justice he would be."

Even though over the past 35 years, 9 of 11 justices have been chosen by Republican presidents — Nixon selected 3; Ford 1; Reagan 3; and Papa Bush 2 — two-thirds of those nine have been deeply disappointing or frustrating to conservatives. There hasn't been a vacancy on the U.S. Supreme Court in eleven years — which has contributed to the highly charged atmosphere surrounding Justice Sandra Day O'Connor's impending retirement. The departure of a swing justice on the Court gives the president the chance to put someone more conservative on the bench, which has steeled both sides for a bruising political, constitutional, and cultural battle.

This piece has been a Niagara of numbers. But in coming weeks, just remember that one number may trump all the rest: 60. Since there are only 44 Democrats in the Senate, the only way they can block President Bush's nominee is to resort to the filibuster, which would require 60 votes to end. But that would mean abandoning the May 23 agreement not to filibuster, a political calculus that has yet to be reckoned.

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