Teacher Guide

Supreme Court Nominations

**Time Needed:** 1-2 Class Periods

**Materials:**
- Student handouts
- Student internet access *(optional)*

**Preparation:**
- Reading *(3 pages; class set)*
- Nomination Activity *(2 pages; class set)*
- Discussion Cards *(enough for groups)*
- Nominee Case Studies *(4 pages; class set OR 1 case study per student)*

**Lesson Objectives:**
- Identify ways in which the nomination of Supreme Court justices is and is not political
- Compare judicial philosophies
- Evaluate the effect of politics on the nomination process
- *(optional)* Research and analyze the nominations and confirmation processes of Robert Bork, Harriet Miers, Clarence Thomas, and Merrick Garland

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**Step by Step**

- **Anticipate**
  - the lesson by asking students to recall anything they’ve heard about Supreme Court nominations in the news, on social media, or in outside discussions. Do people care about who gets appointed to the Supreme Court? Why do students think people might care?

- **Distribute**
  - the reading pages to the class.

- **Read**
  - the reading pages with the class, pausing to discuss, or assign students to read the pages individually or in groups/pairs.

- **Facilitate**
  - the discussion cards activity. (Directions are on the discussion activity page.) The questions are designed to both reinforce and extend students’ thinking about what they learned in the reading.

- **Distribute**
  - the nomination table and activity to the class.

- **Assign**
  - students to complete the nomination activity.

- **Discuss**
  - the answers with the class, along with any other aspects of the table you’d like to point out.

**Optional: Case studies research activity**

- **Assign**
  - a case study to each student, or go crazy and have students complete all four.

- **Distribute**
  - the nominee case study handouts.

- **Direct**
  - students to open an internet browser and follow the directions on the handout to answer the activity questions.

- **Facilitate**
  - students’ research process by circulating to help if they get stuck and support their internet research skills.

- **Group**
  - students after the activity so each group has at least one student who researched each case study.

- **Ask**
  - students to share what they learned with the group so each student ends up learning about each case study.

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New Justice in the Branch

The judicial branch at the federal level is made up of just nine people—the nine justices on the Supreme Court. These nine people are appointed to the Court for life, and together they make decisions about issues that act as law for all Americans. Often, these decisions have a direct impact on people’s everyday lives. When is it okay for law enforcement to search your car during a traffic stop? Or search you if you’re stopped while walking down the street? Can a state ban certain types of guns? Does the Constitution guarantee same-sex couples the right to marry? With these kinds of issues at stake, it’s easy to see why Americans pay attention when there’s a vacancy on the Supreme Court. Who is this person who will become 11% of the judicial branch? Are they qualified? Are they fair? What are their political views, and will they let those views influence their decisions? In the U.S., we expect our judicial system to be impartial and “above politics,” but when it comes to choosing someone to sit on the Supreme Court, that expectation is on a collision course with political reality.

Eeny, Meeny, Miny, Mo

Filling a vacancy on the Supreme Court starts with the President nominating someone for the position. The Constitution doesn’t list any requirements for Supreme Court justices, but even so, there are factors most presidents consider. For one thing, the nominee can’t become a justice without the Senate’s approval. So, is the person likely to be confirmed by the Senate? Do they have the right qualifications and experience? Are they well respected? Do they have a record of fairness? Presidents look for a “yes” answer to all of these questions. They also look for possible pitfalls: Is there anything controversial about the person? If they’ve been a judge, did they make any rulings that seemed biased or wrong? Do they hold extreme views? A “yes” answer to these questions can knock someone out of the running.

Experience Needed

Given the Court’s role, Americans expect Supreme Court justices to be extremely qualified for the job. Technically, the president can nominate anyone to the Supreme Court. But legal thinking requires specialized training, so a president is unlikely to nominate someone who hasn’t been to law school. Even though justices don’t have to have a law degree, so far every single Supreme Court justice has been a lawyer. Most have also had experience as a judge, especially in the U.S. Court of Appeals, which works a lot like the Supreme Court and requires the same kind of thinking and analysis. Nominees might also have experience as lawmakers (lots of elected officials are also lawyers), government attorneys, law professors, or other top-level legal positions.

Diversity

Presidents also consider how the nominee would affect the Court’s diversity. This isn’t just racial or ethnic diversity, although that’s one consideration—it includes gender, religious, and geographic diversity, too. Are women well represented on the Court? Do the justices come from different regions in the United States? Do they represent a variety of religious backgrounds? Achieving or maintaining diversity on the Court isn’t the main factor in choosing a nominee, but it is a factor.
Politics & the Court

Unlike Supreme Court justices, the president is elected to office by citizens who expect the president to carry out a political agenda. Because of the Court’s impact on major issues, the opportunity to nominate a new justice can feel like winning the lottery for the president’s political party. Party members are anxious for the president to choose someone who will decide cases in a way that jives with the party’s ideology. But let’s be clear: Judges at all levels are expected to set aside their personal and political views when they’re behind the bench. They are supposed to apply the law fairly to the unique situation involved in the case and apply the law as it is, not as the judge wants it to be. They do this using legal analysis and principles of law that are the same no matter what the case is about. The problem is, judges disagree about the proper principles and types of analysis, and each Supreme Court justice may approach the exact same case differently. This can result in decisions that appear very political.

Judicial Philosophy

The Supreme Court’s whole job is to interpret the law—especially the Constitution—so the process of nominating a new justice is hyper-focused on the nominee’s ideas about how the Constitution should be interpreted. This is called judicial philosophy. It’s no secret that there are “liberal” and “conservative” justices on the Supreme Court, but in the judicial context, these labels have a special meaning related to the way a judge interprets the U.S. Constitution. Those with an originalist philosophy want to figure out exactly what the Founders intended when they wrote the Constitution in 1787. Those who are textualists look only at the text of the Constitution and try to give it a common sense interpretation without looking at any other evidence, such as what the Founders or lawmakers might have intended. On the opposite end of the spectrum, people who follow the living Constitution theory prefer to interpret the Constitution in the context of modern society and values, recognizing that today’s world and the world in 1787 are very different.

Originalism and textualism are considered conservative, while the living Constitution theory is considered liberal. But beware: This doesn’t mean that judges using these approaches will always arrive at a politically “conservative” or “liberal” decision in a case, although often they do. Also, judges don’t normally cling to one single philosophy. Most often, judges develop their own personal approach and will use several tools of interpretation in order to arrive at a decision.

The President, Politics, and the People

Most nominees have a record of judicial decisions or other actions that reflect views similar to the president’s because—let’s face it—every president hopes to tilt the Court in either a conservative or liberal direction. A judge’s judicial philosophy can often predict how the judge might decide a certain issue, so generally you'll see a conservative president looking for a nominee who does not follow the living Constitution theory, while a liberal president will look for one who does. Most Americans don’t have legal training, so they don’t have a behind-the-scenes concept of the different philosophies of Constitutional interpretation or how judges arrive at their decisions. Because of that, the process of selecting a new Supreme Court justice stays on the level of politics for most people: Would the nominee vote to overturn Citizens United? How would the nominee rule on immigration cases? It’s very common to judge Supreme Court justices based on how they’ve voted in cases related to political issues. The fact that the Court’s job involves hearing cases about these issues makes the Court seem more political than it actually is.
A Political Path

The process of choosing a new Supreme Court justice, however, is political almost every step of the way. The President nominates someone, so that’s political. Once a nominee has been selected, the media hashes and re-hashes the person’s background, speculates about the nominee’s ideology and views, and guesses how “liberal” or “conservative” the nominee’s votes on the Court might be. The Senate Judiciary Committee holds hearings where committee members fire questions at the nominee and explore every detail of his or her qualifications and judicial philosophy. It’s super stressful. And it’s televised. And it’s the Senate, so… it’s political. The committee may try to corner the nominee into committing to a position on a controversial issue, such as how the Second Amendment should be interpreted. Nominees avoid answering these questions because our justice system relies on judges approaching each case impartially. Often, however, there’s enough information in a nominee’s background to give the committee a strong sense of where the judge would likely come down in a case dealing with a particular issue. If not, that can be a problem, too—senators’ careers revolve around political issues, so they are very concerned about the political consequences of approving a particular nominee.

Next, the entire Senate debates whether to confirm the nominee. Senators get up and make statements about the nominee, and since senators are politicians, their opinion of the nominee is political all by itself. (“My constituents are going to love me for supporting this nominee!”) Senators may also slip in a few politically motivated extras during the debate. (“While I’m on the subject of the nominee, let me remind everyone that I firmly oppose the President’s recent executive order…”) Finally, the entire Senate votes on whether to confirm the nominee. Each senator knows that all eyes back home are on their vote, so the way the senator chooses to vote can be a political move.

Not Fun, but Necessary

Ask most nominees, and they would probably tell you they’d rather not go through such a stressful and invasive experience. While they would certainly defend their judicial philosophy, they would disapprove of the parts of the process that make them seem aligned with a certain political view. And no doubt they’d rather skip the part where the media scrutinizes every detail of their private lives—in the case of Clarence Thomas, even searching his garbage cans. The nomination and confirmation process is spelled out in the Constitution, so America’s Founders wanted both the President and the Senate to be involved. It’s how the executive and legislative branches exercise checks and balances over the judicial branch. Despite the political posturing, nominees are very aware that as a Supreme Court justice, they have a responsibility to stay above politics so Americans can have faith in an independent judicial system.
Teacher Directions: Cut out the discussion cards below. (You may need more than one copy of this page.) Put students in groups or pairs and give each group or pair a discussion card. Give students three minutes to discuss. At the end of the three minutes, have groups/pairs trade cards with another group/pair. Repeat as many times as you wish. Circulate while they’re talking to monitor participation. Alternatively, use the discussion questions with your preferred class discussion method.

| What difference do you think it makes whether a Supreme Court justice has experience as a judge? | What are some benefits and risks of each judicial philosophy as a method of interpreting the Constitution? |
| What kinds of things do you think should disqualify someone from being considered as a nominee for the Supreme Court? | What would you tell someone who says they “hate” a certain justice because of the way that justice voted in a case about a controversial issue? |
| With only nine justices on the Court, what would diversity ideally look like? | If you could make one change to the nomination process, what would it be? |
| What advice would you give to a nominee who is frustrated by the nomination process? | How does the nomination and confirmation process let the executive and legislative branches “check” the judicial branch? |
# Supreme Court Nominations

## Nominees, 1980 - Present

<table>
<thead>
<tr>
<th>Nominee</th>
<th>To Replace Justice</th>
<th>Nomination Date</th>
<th>Nominating President</th>
<th>Confirmation Vote</th>
<th>Senate Makeup by Political Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>GARLAND, Merrick</td>
<td>Scalia</td>
<td>3/16/2016</td>
<td>Obama</td>
<td>Dem</td>
<td>44 54 2</td>
</tr>
<tr>
<td>KAGAN, Elena</td>
<td>Stevens</td>
<td>3/10/2010</td>
<td>Obama</td>
<td>Dem</td>
<td>57 41 2</td>
</tr>
<tr>
<td>SOTOMAYOR, Sonia M.</td>
<td>Souter</td>
<td>6/1/2009</td>
<td>Obama</td>
<td>Dem</td>
<td>57 41 2</td>
</tr>
<tr>
<td>MIERS, Harriet</td>
<td>O’Connor</td>
<td>10/7/2005</td>
<td>G.W. Bush</td>
<td>Rep</td>
<td>44 55 1</td>
</tr>
<tr>
<td>BREYER, Stephen G.</td>
<td>Blackmun</td>
<td>5/17/1994</td>
<td>Clinton</td>
<td>Dem</td>
<td>57 43</td>
</tr>
<tr>
<td>GINSBURG, Ruth Bader</td>
<td>White</td>
<td>6/14/1993</td>
<td>Clinton</td>
<td>Dem</td>
<td>57 43</td>
</tr>
<tr>
<td>KENNEDY, Anthony M.</td>
<td>Powell</td>
<td>11/30/1987</td>
<td>Reagan</td>
<td>Rep</td>
<td>55 45</td>
</tr>
<tr>
<td>BORK, Robert</td>
<td>Powell</td>
<td>7/7/1987</td>
<td>Reagan</td>
<td>Rep</td>
<td>55 45</td>
</tr>
<tr>
<td>SCALIA, Antonin</td>
<td>Rehnquist</td>
<td>6/24/1986</td>
<td>Reagan</td>
<td>Rep</td>
<td>47 53</td>
</tr>
<tr>
<td>O’CONNOR, Sandra Day</td>
<td>Stewart</td>
<td>8/19/1981</td>
<td>Reagan</td>
<td>Rep</td>
<td>46 53 1</td>
</tr>
</tbody>
</table>

*All of the independent senators have caucused with the Democrats.*
Forty Years of Nominees. Okay, not quite forty—but almost! The table called “Nominees, 1980 - Present” shows every person nominated for the Supreme Court since Sandra Day O’Connor. Use the table to think through and answer the questions below.

1. Do some math to fill in the mini-table. Then, answer the question.

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<thead>
<tr>
<th>Current Supreme Court Justices</th>
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<td>Percent nominated by Republican presidents</td>
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If judicial decisions were strictly political, how might you expect the vote on every case to come out?

2. Justice Antonin Scalia died on February 13, 2016, leaving only eight justices on the Court—four appointed by Republican presidents and four appointed by Democratic presidents. By January 2017, the vacancy was not yet filled. Yet during this time, very few Court opinions were a 4-4 split. What might this tell you about the relationship between politics and judicial decisions?

3. Look at the confirmation votes for the nominees before the 2000s.
   a. What pattern do you notice? Are there any exceptions?
   b. Compare the president’s political party and the majority party in the Senate. What influence do these two factors seem to have had on whether the nominees were confirmed?

4. Many have observed that since the year 2000, political divisions in America have deepened. What pattern do you see in the table that might have been caused by this? (Count independents as Democrats.)
Nominee Case Study: Bork

Have you ever been “borked”? Unless you’re a political nominee whose nomination got cut short because people attacked your reputation with strong criticism, probably not. But here’s someone who has been: Robert Bork. He got “borked” so bad that his own name is where the word came from. Of course, not everyone agrees that a public attack was Bork’s only problem.

1. Look at the entry for Robert Bork in the nominee table.

What ultimately happened to Bork’s nomination?

President Ronald Reagan (left) with Robert Bork

2. Go online and use the date of the confirmation vote to find a news article from that time period about either the confirmation vote or the Senate Judiciary Committee’s vote. Read the article.

Title: Date: Website:

If someone asked why senators were concerned about Bork, what would you say?

Based on what you learned earlier in this lesson, how would you describe Bork’s judicial philosophy? (If you can’t tell from the article you already found, find another source.)

Many senators did support Bork’s nomination. List some reasons why. (Find another source if necessary.)

3. Find a source from any time period that explains exactly what views Bork had expressed in the past that many people found alarming.

Title: Date: Website:

What were these views?

4. During the confirmation process, there was a lot of public pressure not to confirm Bork. Look through your sources for information about this, or find a new source if necessary.

Explain the role that interest groups and the public played in Bork’s nomination process.
Next, Please.

You’ve probably heard the saying, “You can’t fire me—I quit!” For Harriet Miers, it was more like, “You can’t reject me—I withdraw!” Except without the attitude, of course. When Sandra Day O’Connor retired from the bench, President George W. Bush logically tried to replace the first woman on the Supreme Court with another woman. But for many in the Senate, Miers was no O’Connor.

1. Look at the entry for Miers in the nominee table. Compare the president’s political party with the majority party in the Senate. What do you see? Why might that make you wonder what the problem was?

2. Go online and find a news article about Miers’ nomination from that time period. Read it. Explain where the biggest opposition to Miers was coming from and what the concern was. How does this explain what you saw in Miers’ entry in the table?

3. There was also an issue with Miers’ judicial philosophy. Find a news article about her nomination from any time period that describes the problem. (It will probably discuss other issues, too.)

4. Miers withdrew her nomination for the Court. Look through your sources for an explanation. What was the official reason she withdrew? (Find another source if necessary.)

5. Find a political cartoon about Miers’ nomination from that time period. Explain what the cartoon shows and the point it’s trying to make.
Shocking Allegations

From the start, Clarence Thomas’ nomination was controversial: He was a conservative who would replace a liberal justice, and Americans with liberal views worried about how he would affect the balance on the Court. Members of the Senate Judiciary Committee questioned Thomas about his judicial philosophy and were split about whether to recommend him to the Senate—but nobody could have guessed a much different controversy was about to arise.

1. Look at the confirmation vote for Thomas in the nominee table. How does it compare to other pre-2000 confirmation votes?

2. Go online and find a news article about Thomas’ nomination from any time period that describes his qualifications, experience, and judicial philosophy.

Title: Date: Website:

What did Thomas do before he was nominated for the Supreme Court?

What can you determine about his judicial philosophy? What were his views of the Constitution?

3. Now, find a news article about Clarence Thomas and Anita Hill. Make sure it is not about the 2016 HBO movie. You may need to read more than one in order to answer the questions below.

Title: Date: Website:

Explain the new controversy that came up. What were the allegations? How did Thomas respond?

Explain why both sides seemed believable. Then, explain why it was impossible to learn the truth.

4. Look for information about the justice that Thomas replaced on the Court. (Find another source if necessary.)

Explain who this justice was and his significance on the Court.

5. Justice Thomas is still on the Court. Find reliable sources that talk about what he’s like as a justice.

How is Thomas generally described? What is he known for as a justice?
**Waiting Game**

After Justice Antonin Scalia died in February 2016, it only took President Barack Obama a month to nominate Merrick Garland to fill the vacancy. Normally, this would have set off a frenzy of meetings, background checks, and preparations for the confirmation hearings. But for Garland... Nothing. He waited. And waited. And waited some more. By January 2017, he was still waiting. Hopefully he had some entertaining games on his phone!

| 1. Look at the entry for Garland in the nominee table. Compare the president’s political party with the party makeup in the Senate. |
| What do you see? |

| 2. Go online and find a news article from March 2016 that talks about Merrick Garland. |
| Title: Date: Website: |

| Explain what kind of reputation Garland has among senators and others who know him. |

| 3. Now, find an article that tells you why the Senate didn’t move forward with the confirmation process. |
| Title: Date: Website: |

| In a few words, explain the reason. Do you agree with it? |

| 4. In the nominee table, quickly compare the nomination dates with the confirmation vote dates. |
| In a few words, explain about how long the confirmation process usually takes. |

| Democrats made a related argument about why the Senate needed to give Garland a hearing. In your own words, what was their argument? |

| 5. Find a list of all previous Supreme Court justices that shows the dates they were nominated and confirmed. |
| Can you find examples of justices who were confirmed in a presidential election year? |

| 6. In September 2016, current Associate Supreme Court Justice Ruth Bader Ginsburg made a comment about the Garland nomination. Find a news article that reported what she said. |

| Explain whether you think her comments crossed a line into politics. Does it even matter? |
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If judicial decisions were strictly political, how might you expect the vote on every case to come out?

You might expect every vote to be a tie.

2. Justice Antonin Scalia died on February 13, 2016, leaving only eight justices on the Court—four appointed by Republican presidents and four appointed by Democratic presidents. By January 2017, the vacancy was not yet filled. Yet during this time, very few Court opinions were a 4-4 split. What might this tell you about the relationship between politics and judicial decisions?

Answers will vary, but students should say this shows there is not a strong relationship between politics and judicial decisions.

To extend the activity, have students research the vote statistics for the Supreme Court during this period. Were there any 8-0 votes? (yes)

3. Look at the confirmation votes for the nominees before the 2000s.
   a. What pattern do you notice? Are there any exceptions?

   The table shows that during that time, most senators usually voted to confirm the nominee. The exceptions are Robert Bork, who was rejected, and Clarence Thomas, who was confirmed with a pretty close vote.

   With the two exceptions, the Senate majority seems to have had little effect on whether a nominee was confirmed, even when the president and the Senate majority were from different parties.

   b. Compare the president’s political party and the majority party in the Senate. What influence do these two factors seem to have had on whether the nominees were confirmed?

   Students should observe that since 2000, there is a pattern showing the Senate has voted pretty closely along party lines. This was not the norm in the earlier votes in the table.

4. Many have observed that since the year 2000, political divisions in America have deepened. What pattern do you see in the table that might have been caused by this? (Count independents as Democrats.)

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