



# Nominations to the Supreme Court During Presidential Election Years (1900-Present)

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This CRS Insight provides data and analysis related to nominations made to the Supreme Court during presidential election years from 1900 to the present. As of this writing, there have been eight such nominations since 1900—six to fill actual vacancies that existed at the time a President submitted a nomination to the Senate and two for anticipated future vacancies on the Court (i.e., vacancies that did not exist at the time a President submitted a nomination to the Senate). An anticipated vacancy, [for example](#), arises when a sitting Justice announces his or her intention to retire upon Senate approval of a new Justice.

This Insight is not intended to provide a comprehensive analysis of the Supreme Court nomination and confirmation process. For longer analyses on the Supreme Court selection and confirmation process, see [CRS Report R44235](#) (addressing the selection of nominees by a President), [CRS Report R44236](#) (addressing the role of the Senate Judiciary Committee in processing nominations), and [CRS Report R44234](#) (addressing Senate debate and final action on nominations).

As of this writing, some Senators have [called on the Senate to wait to fill the vacancy](#) created by Antonin Scalia's death until after a new President is inaugurated, while other Senators have [called on the Senate to confirm a nominee](#) during President Obama's final year in office. As discussed in [previous CRS analysis](#) of prior nominations to the Supreme Court, multiple political and policy considerations will influence the length of time for Justice Scalia's successor to be confirmed by the Senate. Note that this Insight does not take a position as to when the Senate should confirm a nominee to the Scalia vacancy.

## **Nominations Made to Fill Actual Vacancies on the Court**

As shown by [Figure 1](#), the Scalia vacancy is historically unique in that, at least since 1900, it is the only vacancy that has existed during the eighth, and final, year of a presidency that also arose during the eighth year itself. The vacancy that existed in 1988 during the Reagan

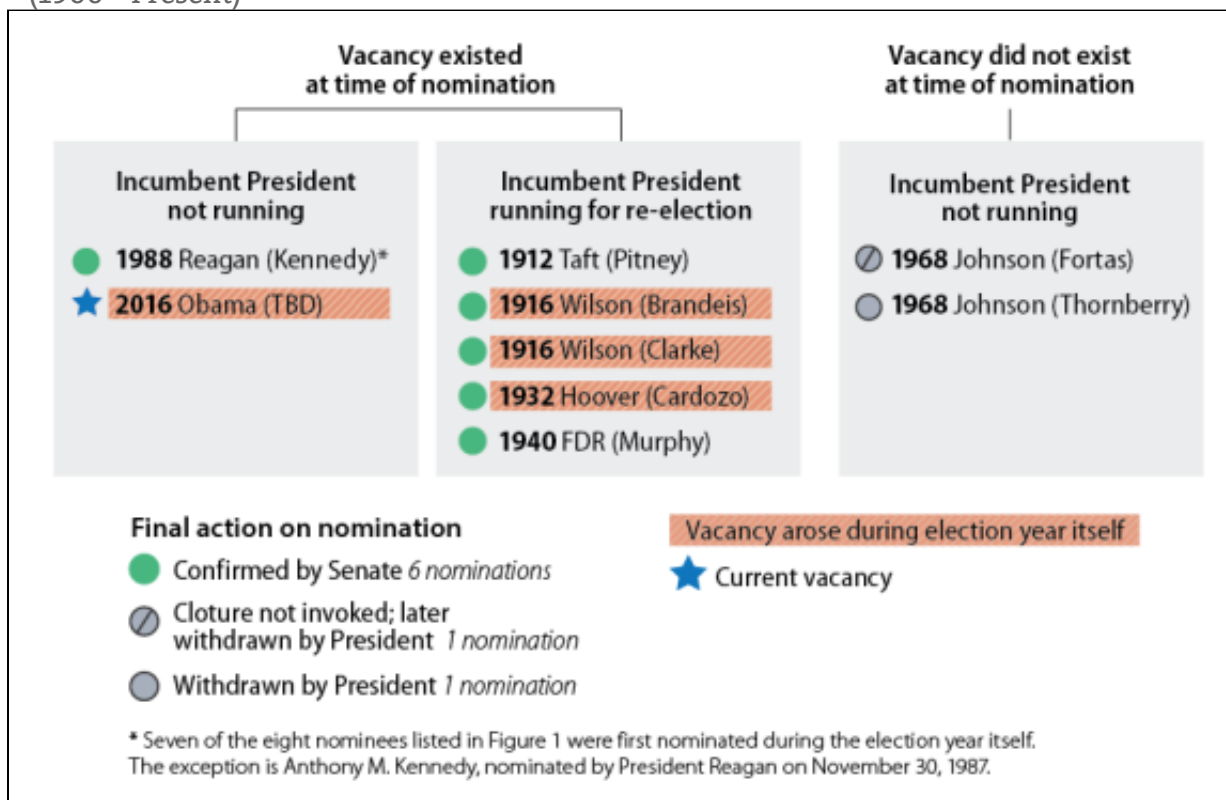
presidency arose prior to the eighth year ([on June 26, 1987](#)).

Note that the vacancy that existed during the 1940 election year occurred during President Roosevelt's eighth year in office. But this vacancy existed prior to the ratification, in 1951, of the [Twenty-second Amendment](#) limiting a President to two terms. President Roosevelt was running for re-election in 1940—consequently, there are only two vacancies since 1900 that existed during the eighth, and final, year of a presidency (1988 and 2016).

**Figure 1** also shows, of nominations made during presidential election years in which a vacancy existed on the Court, five were made during years when a President was running for re-election—1912, two in 1916, 1932, and 1940. In two cases (Presidents Hoover in 1932 and Taft in 1912) the incumbent President was defeated for re-election in the November general election.

By at least one measure (i.e., whether or not a vacancy existed prior to an election year), the circumstances surrounding the Scalia vacancy in 2016 are similar to some of the Supreme Court vacancies that existed during presidential election years in which an incumbent President has run for re-election. Of the five nominations made when a President was running for re-election, three were to vacancies (similar to the current vacancy) that arose during the election year itself—two vacancies arose in 1916 and one vacancy arose in 1932.

**Figure 1. Nominations to the Supreme Court During Presidential Election Years (1900—Present)**



**Source:** Congressional Research Service

**Note:** The last name in parentheses is the last name of the individual nominated by a President. As of this writing, President Obama has announced his intention to nominate an individual to a vacancy created by the death of Antonin Scalia on February 13, 2016. Consequently, "TBD" is "to be determined."

Of the six nominations made to vacancies that have existed during presidential election years since 1900, each was confirmed by the Senate—Kennedy was confirmed 97-0 (1988), Murphy confirmed by voice vote (1940), Cardozo confirmed by voice vote (1932), Clarke confirmed by voice vote (1916), Brandeis confirmed 47-22 (1916), and Pitney confirmed 50-26 (1912).

In five cases when a nominee was confirmed, the party of the President was the same as the majority party in the Senate (Republicans controlled the presidency and Senate in 1912 and 1932, while Democrats controlled the presidency and Senate in 1916 and 1940). In one case (1988), there was a Republican President (Reagan) and a Democratic majority in the Senate.

### **Nominations Made for Anticipated Future Vacancies on the Court**

In the two instances during election years since 1900 when nominations were made for anticipated future vacancies on the Court, rather than actual vacancies, neither was confirmed by the Senate. President Johnson, in 1968, nominated [Abe Fortas](#) to be Chief Justice of the Supreme Court (in anticipation of the retirement of Chief Justice [Earl Warren](#)) and [Homer Thornberry](#) to be an Associate Justice (to replace Fortas, who was already serving on the Court as an Associate Justice). After the Senate [failed to invoke cloture](#) on the Fortas nomination, President Johnson withdrew the nomination. Chief Justice Warren then did not step down from the Court until 1969 and, consequently, no vacancies existed on the Court in 1968. Additionally, the Thornberry nomination was withdrawn by President Johnson given that Justice Fortas was not elevated to the Chief Justice position.

### **Recess Appointments During Presidential Election Years**

Note that **Figure 1** does not include [recess appointments to the Court](#) during presidential election years. Since 1900, there has been one such appointment. On October 15, 1956, [Justice Sherman Minton](#) stepped down from active service on the Court. On that same day, [William J. Brennan](#) received a recess appointment to the Court from President Eisenhower. Mr. Brennan was nominated by President Eisenhower the following year, on January 14, 1957, and confirmed by the Senate on March 19, 1957.