

February 22, 2016: U.S. Supreme Court Nominee Battle

Recent events compel me to temporarily shift focus from Guam's court system to that of the U.S. Supreme Court. Justice Antonin Scalia's sudden death on February 13th has unleashed a political furor that will undoubtedly build in momentum over the next few months. The debate is already deafening with both Republicans and Democrats screaming their positions to anyone who will listen.

Republicans assert that President Obama must defer taking any action on selecting Scalia's replacement and allow his successor to nominate a new justice. On the other hand, Democrats insist that the President is obligated, by virtue of his position, to immediately nominate a replacement. Arguments on both sides are diminished by the fact that each party has taken an opposite position in the past. As a member of the legal community, I find the entire process an embarrassment. What is a non-lawyer to make of this mess?

This seems a perfect time to take a close look at the process for replacing a Supreme Court Justice and to put the selection process into historical perspective.

The Supreme Court was established in 1789 under Article III of the U.S. Constitution. Congress sets the number of sitting justices. The number has changed several times over the past 225 years. Initially, in 1789, there were six justices. Congress increased the number to seven in 1807, up to nine in 1837, and added a 10th in 1863. In 1866, the number decreased to seven, and then back up to nine in 1869, where it remains to this day.

The Constitution sets no qualifications for Supreme Court justices as it does for presidents and for members of Congress. However, all 112 justices have been lawyers. Of this number, 108 have been men and 4 have been women. Six justices were born in countries other than the U.S.

Only two African Americans have served as justices, Thurgood Marshall and Clarence Thomas. Sonia Sotomayor, appointed by President Obama in 2009, was the first and only Hispanic justice. However, some argue that Justice Benjamin N. Cardozo should also be considered Hispanic. No Americans of Asian, Native American, or Pacific Island heritage has ever served on the Supreme Court.

The youngest justice, Joseph Story, was 32 when he took the bench. Oliver Wendell Holmes was the oldest justice. He retired at the age of 90.

Five justices were never married. No openly gay individual has served on the Supreme Court.

Most justices have been Protestant Christians, including 33 Episcopalians, 18 Presbyterians, nine Unitarians, five Methodists, three Baptists, one Lutheran and one Quaker. Eleven justices have been Catholic and eight Jewish. Interestingly, of

the eight current justices, five are Catholic and three are Jewish. Scalia himself was a Catholic.

Supreme Court justices can serve for life, should they wish, or they can resign or retire. A total of 54 have retired or resigned. Although Congress can remove a justice, this has never occurred. The average age of a new justice is 53, and, on average, serves about 15 years. However, since 1970, this has increased to 26 years of service.

When a vacancy on the Supreme Court arises, Article 2 of the U.S. Constitution requires the President to “nominate, and by and with the Advice and Consent of the Senate” to appoint a replacement. Presidents have submitted a total of 160 nominations. Once the President nominates a candidate to the Supreme Court, the Senate Judiciary Committee holds hearings and questions the nominee. The Committee then votes on whether the nomination should be referred to the full Senate for a vote.

Technically, to be successful, a simple majority must vote to confirm the candidate. However, with some legislative maneuvering some candidates will need 60 votes from the 100-member Senate. The Senate has only outright rejected twelve nominees. However, a number of candidates have willingly dropped out of consideration both before and after confirmation.

What heightens the situation with Scalia’s demise is the fact that this is an election year. Since 1900, eight Supreme Court nominees have gone before the Senate for confirmation during an election year. Of these, six were confirmed.

Prior to 1981, the nomination process took less than a month. Since the Reagan administration, the time has increased to 67 days. The longest Senate confirmation process was 125 days. President Obama has 330 days remaining in his term. Obviously, history demonstrates that this is more than sufficient time to complete the nomination process.

As a consequence, I believe that Obama is obligated to nominate a replacement for Scalia and that the Senate is required to act on the nomination. Let’s stop the politicking on both sides and get our judicial system back up to full speed.