Who Can Be a Supreme Court Justice

Post Written by Shea Denning

My daughter came home from elementary school last week with notecards seeking support for her nomination to serve as a justice on the U.S. Supreme Court. I think that is it pure coincidence that her politicking coincided with the nationwide interest in potential nominees for the position following the death of Justice Antonin Scalia. But because I, like everyone else, had been thinking about how the vacancy on the court would be filled and by whom, her work got me thinking: Who exactly *can be* a Supreme Court Justice?

The obvious way to find the answer to this question is to Google it. I, however, started by reading the U.S. Constitution. I read it all the way through—twice (with the exception of that murky electors stuff in Article II)—thinking I'd missed something on the first go-round. All it says on the matter is that the President must "nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Judges of the supreme Court . . . ." U.S. Const. Art. II § 2. It does go on to say that federal judges "shall hold their Offices during good Behaviour . . . . ." U.S. Const. Art. III § 2. There is nothing about citizenship (natural born or otherwise), how old a judge or justice must be, or even whether such a judge must be educated in the law.

After reading this, I worried that I had missed an essential Constitutional Law class. Forget Originalism. Had the Supreme Court said something about its own members' qualifications that I missed? Had Congress enacted additional requirements? *Could* Congress enact additional requirements? At this point, my senses prevailed and I googled the question.

The "Frequently Asked Questions" section of the United States Supreme Court's website provided the answer. Here's what it says:

The Constitution does not specify qualifications for Justices such as age, education, profession, or native-born citizenship. A Justice does not have to be a lawyer or a law school graduate, but all Justices have been trained in the law. Many of the 18th and 19th century Justices studied law under a mentor because there were few law schools in the country.

- *The last Justice to be appointed who did not attend any law school was James F. Byrnes (1941-1942). He did not graduate from high school and taught himself law, passing the bar at the age of 23.*
- *Robert H. Jackson (1941-1954). While Jackson did not attend an undergraduate college, he did study law at Albany Law School in New York. At the time of his graduation, Jackson was only twenty years old and one of the requirements for a law degree was that students must be twenty-one years old. Thus rather than a law degree, Jackson was awarded with a*

> *"diploma of graduation." Twenty-nine years later, Albany Law School belatedly presented Jackson with a law degree noting his original graduating class of 1912.*

The genius of the Framers is apparent with respect to this Constitutional provision as with so many others. Alexander Hamilton wrote in Federalist No. 78 that "there can be few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges." Plus, Hamilton explained, once you account for the "ordinary depravity of human nature," the number of those who "unite the requisite integrity with the requisite knowledge" is even smaller. Indeed, despite the lack of explicit constitutional requirements, nominees for the position of Supreme Court justice are selected—at least in part—based upon their superior legal acumen and professional accomplishments. As the late Justice Scalia noted last term, all of the current Supreme Court justices are “successful lawyers who studied at Harvard or Yale Law school.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

I’ve told my daughter to keep building her resume.