



## What happens to a pending judicial nomination if the appointing President dies/resigns?

*At least three judges nominated by President Nixon were appointed by President Ford. Ditto for nominees by President Kennedy.*

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Tonight, President Trump announced that he would undergo a quarantine after his aide, Hope Hicks, tested positive for COVID-19. [**Update:** The President tweeted that he tested positive for COVID-19]. I'm sure others have already gamed out what happens in the electoral college if the President dies before or after election day. (I previously considered a related morbid question). Here, I'd like to pose a different succession-related question: what happens to a pending judicial nominee if the nominating President dies, or resigns?

I looked into this question some time ago, and am finally able to dust off the answer. Well, at least a tentative answer. We can look to past practice.

President Nixon resigned on August 9, 1974. But he was quite busy before he left office. He made two "midnight" appointments on August 8, 1974.

- On August 8, Nixon nominated Robert W. Warren to the U.S. District Court for the Western District of Wisconsin. He was confirmed by the Senate on August 22. And President Ford signed his commission on August 27.
- On August 8, Nixon nominated Judge Donald D. Alsop to the U.S. District Court for the District of Minnesota. He was confirmed on December 18. And President Ford signed his commission on December 20.

Why these two judges? These were among the final acts Nixon took before he resigned, "effective at noon tomorrow." I would love to know the history here.

Nixon also nominated Judge Murray Gurfein to the Second Circuit on July 11, 1974. He was confirmed on August 22, 1974. And President Ford signed his commission on August 27.

Let's go back further. President Kennedy was assassinated on November 22, 1963. At that time, he had three pending judicial nominations.

- On July 22, 1963, Kennedy nominated Charles Tenney to the U.S. District Court for the Southern District of New York. He was confirmed on December 5, 1963. President Johnson signed his commission on December 12, 1963.
- On September 9, 1963, Kennedy nominated George Edwards to the Sixth Circuit. He was confirmed on December 16, 1963. President Johnson signed his commission on December 19, 1963.
- On July 9, 1963, Kennedy nominated William Homer Thornberry to the U.S. District Court for the Western District of Texas. Thornberry was confirmed on July 15, 1963, *before* Kennedy's death. But Kennedy did not sign the commission in time. Why? Is there some backstory here? After Kennedy's death, President Johnson signed the commission on December 17, 1963.

Thornberry would play a far more important role in the judicial process five years later. In June 1968—five months before the presidential election—President Johnson nominated Associate Justice Abe Fortas to fill the vacant seat left by Chief Justice Earl Warren. Then, President Johnson nominated Thornberry to fill Abe Fortas's Associate Justice seat. But Fortas withdrew his candidacy in October 1968—one month before the election. At that point, the Thornberry nomination became moot. And, wouldn't you know it, the Chief Justice position was vacant through the election. And the winner of the election, Richard Nixon, filled the seat with Warren Burger. (If you are interested in this convoluted history, check out Ilya Shapiro's excellent new book, *Supreme Disorder*.)

I haven't checked the pending nominees from Presidents Roosevelt, Harding, McKinley, Garfield, Lincoln, Taylor, and Harrison. But I suspect the practice was the same.

These precedents suggest that any pending nominations made by President Trump would survive President Trump.

8 The Electors contend that elector discretion is needed to deal with the possibility that a future presidential candidate will die between Election Day and the Electoral College vote. See Reply Brief 20–22. We do not dismiss how much turmoil such an event could cause. In recognition of that fact, some States have drafted their pledge laws to give electors voting discretion when their candidate has died. See, e.g., Cal. Elec. Code Ann. §6906; Ind. Code §3–10–4–1.7. And we suspect that in such a case, States without a specific provision would also release electors from their pledge. **Still, we note that because the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.**

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