2 THE JUSTICES

The Supreme Court's overruling of *Roe v. Wade* in 2022 was made possible by President Trump's appointments of Brett Kavanaugh and Amy Coney Barrett to the Court. Kavanaugh and Barrett joined with three of their colleagues to create the five-justice majority that fully overruled the *Roe* decision in *Dobbs v. Jackson Women's Health Organization*. The *Dobbs* decision thereby underlined a key reality about the Court: the decisions it reaches are largely a product of who its members are. For that reason, the choices of presidents and senators that determine who will sit on the Court are of fundamental importance. For the same reason, individuals and organizations devote a great deal of energy and resources to their efforts to influence those choices.

The extent of those efforts and the level of conflict over selection of justices have grown considerably since the beginning of this century. These changes reflect two key developments that have occurred over the past several decades. One is a growing recognition of the Court's substantial role in shaping public policy, a recognition that has produced greater interest in shaping the Court's membership. The other is the growth of political polarization, especially in the form of increased conflict between Republicans and Democrats.

This chapter examines the processes that determine the Court's membership in three stages. The first and longest section discusses how justices are nominated and confirmed to fill vacancies on the Court. The second section turns to the outcomes of that process in terms of the attributes of the people who win seats on the Court. The final section deals with the creation of vacancies on the Court that allow the appointment of new justices. Throughout the chapter, I give particular attention to the changes that have occurred in both the processes that determine the Court's membership and the kinds of people who become justices.

THE SELECTION OF JUSTICES

As of mid-2023, presidents have made 165 nominations to the Supreme Court, and 116 people have served as justices. The difference between those two numbers has several sources, including nominees who declined appointments and those who were appointed as associate justice and then as chief justice. But the most common source was a failure to win Senate confirmation. Table 2.1 lists the thirty-three nominations to the Court and the twenty-five justices chosen between 1961 and 2022.

TABLE 2.1 ■ Nominations to the Supreme Court since 1961

Name	Nominating president	Justice replaced	Years served
Byron White	Kennedy	Whittaker	1962–1993
Arthur Goldberg	Kennedy	Frankfurter	1962–1965
Abe Fortas	Johnson	Goldberg	1965–1969
Thurgood Marshall	Johnson	Clark	1967–1991
Abe Fortas (CJ)	Johnson	(Warren)	Withdrew, 1968
Homer Thornberry	Johnson	(Fortas)	Moot, 1968
Warren Burger (CJ)	Nixon	Warren	1969–1986
Clement Haynsworth	Nixon	(Fortas)	Defeated, 1969
G. Harrold Carswell	Nixon	(Fortas)	Defeated, 1970
Harry Blackmun	Nixon	Fortas	1970–1994
Lewis Powell	Nixon	Black	1971–1987
William Rehnquist	Nixon	Harlan	1971–2005
John Paul Stevens	Ford	Douglas	1975–2010
Sandra Day O'Connor	Reagan	Stewart	1981–2006
William Rehnquist (CJ)	Reagan	Burger	1986–2005
Antonin Scalia	Reagan	Rehnquist	1986–2016
Robert Bork	Reagan	(Powell)	Defeated, 1987
Douglas Ginsburg	Reagan	(Powell)	Withdrew, 1987
Anthony Kennedy	Reagan	Powell	1988–2018
David Souter	G. H. W. Bush	Brennan	1990–2009
Clarence Thomas	G. H. W. Bush	Marshall	1991–
Ruth Bader Ginsburg	Clinton	White	1993–2020
Stephen Breyer	Clinton	Blackmun	1994–2022
John Roberts (CJ)	G. W. Bush	Rehnquist	2005–
Harriet Miers	G. W. Bush	(O'Connor)	Withdrew, 2005
Samuel Alito	G. W. Bush	O'Connor	2006–
Sonia Sotomayor	Obama	Souter	2009–
Elena Kagan	Obama	Stevens	2010–

TABLE 2.1 ■ Nominations to the Supreme Court since 1961 *(Continued)*

Name	Nominating president	Justice replaced	Years served
Merrick Garland	Obama	(Scalia)	Not considered, 2016
Neil Gorsuch	Trump	Scalia	2017–
Brett Kavanaugh	Trump	Kennedy	2018–
Amy Coney Barrett	Trump	Ginsburg	2020–
Ketanji Brown Jackson	Biden	Breyer	2022–

Note: CJ = chief justice. Fortas and Rehnquist were associate justices when nominated as chief justice. Roberts was originally nominated to replace O'Connor and then was nominated for chief justice after Rehnquist's death.

Withdrew = Nomination or planned nomination was withdrawn. The Fortas nomination was withdrawn after a vote to end a filibuster failed. Douglas Ginsburg withdrew before he was formally nominated.

Moot = When Fortas withdrew as nominee for chief justice, the Thornberry nomination to take Fortas's position as associate justice became moot.

Defeated = Senate voted against confirmation.

Not considered = Senate did not consider nomination.

The Constitution gives formal roles in the selection of justices only to the president (for nomination, and then appointment if a nominee is confirmed) and the Senate (for confirmation of nominees). But in addition to those who assist presidents and senators, a variety of other people and groups play significant unofficial roles. I will discuss those unofficial participants and then consider how the president and the Senate reach their decisions.

Unofficial Participants

Even before a vacancy on the Court arises, presidents and other administration officials get advice from a variety of sources about who should be nominated if a vacancy does occur. Once the president has an opportunity to make a nomination, people outside the administration intensify their efforts to influence the president's choice. After the president selects a nominee, similar efforts focus on senators who will vote for or against confirmation of the nominee. The most important of these individuals and groups fall into three categories: prospective justices, the legal community, and other interest groups.

Candidates for the Court

Some Supreme Court nominees had never thought of themselves as potential justices. Indeed, some prospective nominees withdraw from consideration, and some turn

down nominations. Even those who accept nominations sometimes do so reluctantly, as Abe Fortas did in 1965 and Lewis Powell did in 1971.

But for many lawyers, the Supreme Court is a long-standing dream. Perhaps in jest, one longtime acquaintance of Brett Kavanaugh reported that "he's been running for the Supreme Court since he's been 25 years old."[1] In the current era, the overwhelming majority of justices come from the ranks of judges on the federal courts of appeals. Lawyers who want presidential appointments to the courts of appeals look for opportunities to take positions and make contacts that will enhance their chances to achieve that goal. For conservatives in the current era, to take one example, active participation in the Federalist Society does much to facilitate appointment to a court of appeals.

After judge take seats on the courts of appeals, they may make efforts to win promotion to the Supreme Court. Judges sometimes seek to garner attention through activities outside their official duties, such as speeches and law review articles. And there is circumstantial evidence that judges sometimes take positions in cases that they hope will enhance their chances of promotion.[2] Judges occasionally write long concurring or dissenting opinions that are likely to appeal to presidents of their party. In doing so they may be "auditioning," as some other judges have described such opinions.[3]

Whether or not they were auditioning, Amy Coney Barrett and Ketanji Brown Jackson as federal judges both wrote opinions that could be expected to bring them to the attention of presidents or their advisors. Barrett's dissenting opinion in a 2019 gun regulation case adopted a broad interpretation of Second Amendment rights that would appeal to Republican presidents. In the same year, Jackson wrote a district court opinion ruling that White House Counsel Donald McGahn could be required to testify before a House committee that was considering impeachment of President Trump. Her opinion included the line, "Presidents are not kings."[4]

If the opportunity for a Supreme Court appointment does arise, prospective justices are unlikely to succeed without directing campaigns themselves or having others do that for them. When he was a leading candidate for a nomination in 2018, Brett Kavanaugh's judicial chambers were the central location for work by his former law clerks to help secure the nomination for him. According to one account, "Nobody was working harder than Kavanaugh himself," because "he wouldn't be able to live with himself if he were not chosen because he had failed to prepare."[5] Kavanaugh did win the nomination.

Nominees participate actively in the confirmation process. They typically meet with most senators before their confirmation hearings. Occasionally, what nominees say in those meetings seems to have an impact. When Republican Senator Susan Collins announced that she would vote for Kavanaugh's confirmation, she cited what she saw as his commitment to uphold *Roe v Wade*.[6]

Sarah Silbiger/Getty Images

Judge Amy Coney Barrett meets with Senator Shelley Moore Capito of West Virginia prior to her confirmation hearing for a Supreme Court seat in 2020. In the current era, all Court nominees meet with a large number of senators.

Nominees also testify for many hours before the Senate Judiciary Committee at their hearings and provide voluminous written materials to the committee. Nominees go through elaborate preparations for their testimony. The Trump administration brought together advisors to help Neil Gorsuch prepare in 2017, and he ultimately rebelled at their efforts to tell him how to respond to senators' questions. Gorsuch even suggested that he could withdraw his own nomination and continue to serve as a court of appeals judge.[7]

When nominees testify, senators who support confirmation typically use their questions to help the nominee make a favorable impression. Senators who are negatively inclined ask questions that raise criticisms of the nominee or that might elicit damaging answers. Senators on both sides also use their questions to make political points, and prospective presidential candidates take lines of questioning that they hope will appeal to their party's activists.

Questions often concern a nominee's views about past decisions or issues that the Court might address in the future.[8] Typically, nominees take positions on a few issues on which they know their answers will be popular or uncontroversial. With that exception, they turn back questions about judicial issues on the ground that they do not want to prejudge issues that might come before the Court. One commentator described the "key lessons" for nominees from recent confirmation hearings: "Say nothing, say it at great length, and then say it again."[9]

When senators are truly undecided about their confirmation votes, what a nominee says (or refuses to say) before the Judiciary Committee can affect the outcome. In 1987, for instance, Robert Bork's testimony increased some senators' concerns about his views on issues that the Court addresses and thereby contributed to the vote against his confirmation. But today, in an era of strong political polarization, senators generally make up their minds on a partisan basis quite early. For that reason, few votes on confirmation are affected by nominees' testimony.

The Legal Community

Lawyers have a particular interest in the Supreme Court's membership, and their views about potential justices can carry special weight. A committee of the American Bar Association (ABA), the largest and most prominent organization of lawyers, investigates presidential nominees for federal judgeships, including the Supreme Court, and rates them as "well-qualified," "qualified," or "not qualified." All the committee's ratings of Supreme Court nominees since 1993 have been that they are "well-qualified," and all but one have been unanimous. That exception was Amy Coney Barrett, who was given that rating by "a substantial majority" of the committee members; the others rated her as "qualified."[10]

For a long period, presidents allowed the ABA committee to rate prospective nominees before they were selected, a role that enhanced the committee's influence. But George W. Bush, Donald Trump, and Joe Biden have denied it that role. The Bush and Trump actions reflected a perception that the committee is biased against conservative nominees. That perception was probably reinforced by the dissents from the well-qualified rating of Justice Barrett.

Other legal groups and individual lawyers also participate in the selection process. The most important legal group for Republican presidents is the Federalist Society, the leading organization of conservative lawyers and law students. When Donald Trump as a presidential candidate sought to assure conservatives that he would select conservative justices if he became president, the Federalist Society was one of two groups that played key roles in assembling a list of potential nominees that Trump announced in May 2016. A month later, Trump said that "we're going to have great judges, conservative, all picked by the Federalist Society."[11] The Society played a similar role in creation of the revised lists of Trump candidates that were issued later in 2016 and in 2017 and 2020. Leonard Leo, executive vice president of the Society, helped to coordinate the processes that culminated in the three Trump nominations.

Supreme Court justices sometimes participate in the selection process, most often by recommending a potential nominee. Chief Justice Warren Burger, appointed by Richard Nixon in 1969, suggested names to fill other vacancies during the Nixon administration. He played a crucial part in the 1970 nomination of his longtime friend Harry Blackmun. Some years later, Burger lobbied the Reagan administration on behalf of Sandra Day O'Connor.[12] Anthony Kennedy's support for his former law clerk Brett Kavanaugh helped to bring about President Trump's selection of Kavanaugh as Kennedy's successor.[13]

Other Interest Groups

A great many interest groups have a stake in Supreme Court decisions, so groups regularly seek to influence the selection of justices. The level of group activity has grown substantially in the past half century, and it now pervades both the nomination and confirmation stages of the selection process.

Interest groups would most like to influence the president's nomination decision. The groups that actually exert influence at this stage generally are those that are politically important to the president. Democratic presidents give some weight to the views of labor and civil rights groups. Republican presidents pay attention to groups that take conservative positions on social issues such as abortion. The Heritage Foundation, a conservative group with a broad agenda, worked alongside the Federalist Society in helping to build the lists of potential Trump nominees for the Court.

The influence of these core groups was underlined in 2005, after President George W. Bush nominated White House Counsel Harriet Miers to succeed Sandra Day O'Connor. Many conservatives were uncertain that Miers was strongly conservative, and some groups and individuals mounted a strong campaign against her. After their campaign secured Miers's withdrawal, President Bush chose Samuel Alito, who was popular with conservative groups.

Once a nomination is announced, groups work for or against Senate confirmation. Significant interest group activity at this stage was limited and sporadic until the late 1960s.[14] Its higher level since then reflects growth in the intensity of political activities by interest groups, greater awareness that nominations to the Court are important, and group leaders' increased understanding of how to influence the confirmation process. Leaders of some groups have also found that support for nominees or opposition to them is a good way to generate interest in their causes and monetary contributions from their supporters.

Groups that opposed specific nominees achieved noteworthy successes between 1968 and 1970. Conservative groups helped to defeat Abe Fortas, nominated for elevation to chief justice by Lyndon Johnson in 1968, and labor and civil rights groups helped to secure the defeats of Richard Nixon's nominees Clement Haynsworth and G. Harrold Carswell. President Reagan's nomination of Robert Bork in 1987 gave rise to an unprecedented level of group activity, and the strong mobilization by liberal groups was one key to Bork's defeat in the Senate.

Since the Bork nomination, interest groups have been involved in the confirmation process for every nominee. Group activity increases with perceptions that a nominee would shift the ideological balance in the Court substantially and that a nominee might be vulnerable to defeat. But even when these conditions are lacking, there are always some groups that mount campaigns for and against nominees, and these campaigns have been sizeable on all the nominees since 2016.

The most visible and most expensive element of this campaign activity is advertising. The groups that engage in these campaigns are not required to report their

spending, but it is clearly quite substantial. The conservative Judicial Crisis Network spent at least $10 million in support of Neil Gorsuch and $12 million on behalf of Brett Kavanaugh, and it announced a $10 million campaign for Amy Coney Barrett.[15] The stakes in the nomination of Ketanji Brown Jackson for interest groups were lower, because her confirmation would not disturb the 6–3 conservative majority in the Court. Still, the Judicial Crisis Network worked against confirmation while the liberal group Demand Justice acted in support of her.

The regular involvement of interest groups and their appeals to the general public underline how the process of selecting justices has opened up over time. As one scholar put it, nomination and confirmation now include "a broad array of players—both internal and external—and are conducted much like other political processes in a democracy."[16]

The President's Decision

One key attribute of Supreme Court nominations is variation: the process of selecting nominees and the criteria for choosing those nominees differ from president to president and even among the nominations that one president makes. But there are also some general patterns in process and criteria that can be identified.[17]

Presidents vary in their personal involvement in the selection process, but all the presidents serving in this century have played active roles. Still, presidents delegate most of the search process to other officials in the executive branch. In recent administrations, the process has been centered in the Office of the White House Counsel.

Administrations in the current era typically do a good deal of preparation even before there is an opportunity to make a nomination. In the George W. Bush administration, White House officials interviewed prospective nominees in 2001, four years before there was a vacancy to fill.[18] Once a vacancy occurs, occasionally a president fixes on a single candidate for nomination. More often, administrations create a short list and then work to identify the best candidate from that list, as President Biden did in 2022. This process allows presidents and other officials to work systematically through the advantages and disadvantages of choosing different names from the list. But uncertainties about potential nominees and shifting conditions sometimes introduce an element of chaos to the process. That was especially true of the two nominations by President Clinton.

President Trump's nominations were unusual in the announcement of prospective nominees before Trump was elected and in the integral roles played by two interest groups in identifying those candidates. The lists of candidates were put together by Donald McGahn, who became White House Counsel after Trump was elected. McGahn also headed up the efforts to choose nominees. According to one report, McGahn had a clear vision of President Trump's first two nominations even before Trump took office: Neal Gorsuch would be nominated to fill the existing vacancy on the Court, the administration would encourage Anthony Kennedy to retire, and Brett Kavanaugh would be nominated to fill his seat.[19]

Even so, Trump interviewed multiple candidates for both of those seats. When the three interviews for the 2017 vacancy were completed, McGahn strongly recommended Gorsuch and Trump chose him.[20] Before he nominated Kavanaugh in 2018, Trump met four prospective nominees and spoke on the phone with a fifth. The path to nomination was not as smooth for Kavanaugh as it was for Gorsuch, in part because some conservatives lobbied strongly against him. But after two interviews of Kavanaugh and a telephone conversation with him, as well as considerable input from an array of other people, the president offered him the nomination.[21]

Amy Coney Barrett was certainly the leading candidate for the nomination that she received in 2020. Two years earlier, Trump considered Barrett for the nomination that Kavanaugh received but ultimately told people that "I'm saving her for Ginsburg"—that is, for Ruth Bader Ginsburg's seat if she left the Court.[22] When Ginsburg died, Barrett was nominated with extraordinary speed. Two White House staff members contacted her the day after Ginsburg's death. President Trump offered her the nomination and she accepted it two days later, after she had a series of meetings with members of the administration, though the nomination was not announced until later that week.

As a presidential candidate, Joe Biden resisted calls to follow Trump's lead and issue a list of potential Supreme Court nominees, but he pledged to select a Black woman. Biden and his staff began working on selecting a nominee in anticipation of retirement by Justice Stephen Breyer. Biden studied information on the candidates, called senators to get their input and build support for the candidate he would select, and interviewed the three finalists.[23] His nominee Ketanji Brown Jackson was contacted by White House Counsel Dana Remus four days after Breyer announced that he would retire, and she remained in contact with Remus and other White House personnel after that. She talked with Vice President Kamala Harris over Zoom before meeting with Biden a few days later. Ten days after that interview and about a month after Breyer's announcement, Biden offered her the nomination.[24]

Possible criteria for nominations to the Court fall into several categories: the "objective" qualifications of potential nominees, their policy preferences, rewards to political and personal associates, and building political support. Cutting across these criteria and helping to determine their use is the goal of securing Senate confirmation for a nominee.

"Objective" Qualifications

Presidents have strong incentives to select Supreme Court nominees who have demonstrated high levels of legal competence and adherence to ethical standards. For one thing, most presidents respect the Court. Further, highly competent justices are in the best position to influence their colleagues. Finally, serious questions about a nominee's competence or ethical behavior can make confirmation more difficult.

Because presidents care about competence, ordinarily there are no serious questions about a nominee's capacity to serve on the Court. One exception was Nixon's nominee G. Harrold Carswell, who was denied confirmation in 1970. Perceptions that

Harriet Miers had only limited knowledge of constitutional law were one source of the opposition that led her to withdraw as a nominee in 2005.

The ethical behavior of several nominees has been questioned. Opponents of Abe Fortas (when he was nominated for promotion to chief justice), Clement Haynsworth, Stephen Breyer, and Samuel Alito pointed to what they saw as financial conflicts of interest. Fortas was also criticized for continuing to consult with President Johnson while serving as an associate justice. The charges against Fortas and Haynsworth helped prevent their confirmation. After Douglas Ginsburg was announced as a Reagan nominee, a disclosure about his past use of marijuana led to his withdrawal. Allegations of sexual misconduct by Clarence Thomas and Brett Kavanaugh resulted in special sets of Senate hearings on these allegations and potentially put their confirmation in jeopardy.

To minimize the possibility of such embarrassments, administrations today give close scrutiny to the competence and ethics of potential nominees. This does not necessarily mean that the people chosen to serve on the Court are the most qualified of all possible appointees. One highly respected federal judge expressed the view that the justices are probably not "nine of the best 100 or, for that matter, 1,000 American lawyers."[25] But presidents do seek to choose lawyers who have demonstrated a high level of skill as well as ethical conduct.

Policy Preferences

By policy preferences, I mean an individual's attitudes toward policy issues. The policy preferences of prospective nominees have always been a consideration in the selection of Supreme Court justices, but presidents have not always given substantial weight to this consideration. This is one reason why some justices appointed by Republican presidents have had moderate to liberal records on the Court and some Democratic appointees have had moderate to conservative records.

In the current era, in contrast, every president pays considerable attention to the policy preferences of prospective nominees. This emphasis reflects the Court's increased prominence as a policymaker and the strong concern about the Court's direction among interest groups that are associated with each political party. But presidents of the two parties have taken somewhat different approaches.

Since the 1980s, Republican presidents have given particular emphasis to policy considerations. In part, this is because Republican leaders, activists, and voters generally share strongly conservative views on issues that the Court addresses. Also important are past disappointments. Between 1969 and 1991, all ten appointments to the Court were made by Republican presidents. But the records of some of those justices were relatively moderate, and three—Harry Blackmun (appointed by Nixon), John Paul Stevens (Ford), and David Souter (George H. W. Bush)—were actually on the liberal side of the Court's ideological spectrum during much or most of their tenure. Two justices appointed by Republican President Eisenhower in the 1950s, Earl Warren and William Brennan, had strongly liberal records on the Court.

In response to these disappointments, party activists have pushed Republican administrations to give heavy weight to prospective nominees' policy preferences as a criterion and to probe carefully for evidence about those preferences. Their efforts were reflected in the nominations of John Roberts and Samuel Alito by George W. Bush. Later, conservative groups played key roles in Donald Trump's choices of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. All three had extensive records of conservative positions, and each had been active in the Federalist Society.

For recent Democratic presidents, the picture is more complicated. Most fundamentally, ideology is not the key unifying force in the Democratic Party that it is for Republicans; the Democrats are more "a coalition of social groups."[26] And in part for that reason, Supreme Court policy has not been as high a priority for Democrats. As a result, Bill Clinton and Barack Obama felt little pressure to choose strong liberals. Indeed, four of their five nominees—Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Merrick Garland—were perceived as relatively moderate. (Sonia Sotomayor was the exception.) Memoranda by people helping Clinton choose a nominee in 1993 described Breyer as moderate or even moderately conservative on some issues, but Clinton nonetheless nominated Breyer to the Court a year later.[27]

Obama's 2016 nomination of Garland was a special case, because the Republican majority's leadership in the Senate had announced that it would not consider any Obama nominee to fill the vacancy that arose from Justice Scalia's death. Obama sought someone whose attributes might cause some Republican senators to break from their leadership's position. But the other four Clinton and Obama nominations came when Democrats held Senate majorities. For the two presidents, one motivation was to choose people who would not arouse strong opposition from Republicans, so that confirmation would be relatively easy.

By the time that Joe Biden took office in 2021, things had changed on the Democratic side. The battles over confirmation of Court nominees between 2016 and 2020 aroused considerable anger among Democrats, and the appointment of Justice Barrett in 2020 seemed likely to move the Court strongly in a conservative direction. As a result, choosing strong liberals became a high priority for Democrats just as choosing strong conservatives had been for Republicans.

When Justice Breyer retired in 2022, public discussion of the pending nomination focused on Biden's pledge to name a Black woman. Relatively little attention was given to the policy views of the three finalists for that nomination. But there was evidence that Ketanji Brown Jackson had the most liberal views of those finalists, and a coalition of liberal groups issued a statement that indirectly supported her.[28] Jackson had also been active in the American Constitution Society, the liberal counterpart of the conservative Federalist Society. Another finalist, J. Michelle Childs, had strong support from her fellow South Carolinian James Clyburn, a House Democratic leader who was a key political ally of Biden's. In choosing Jackson rather than Childs, Biden implicitly indicated the importance of a prospective justice's policy preferences to him.

Presidents of both parties seek to ascertain the views of prospective nominees on issues of legal policy. This is the primary reason why every nominee since 1986 except for Elena Kagan and Harriet Miers has come from a federal court of appeals. If a judge has a long record of judicial votes and opinions on issues of federal law, as Sonia Sotomayor, Neil Gorsuch, and Brett Kavanaugh did, presidents and their advisors can be fairly sure about the judge's views on many issues.

Even in an era in which presidents give heavy weight to prospective justices' policy preferences, not all nominees have these long records. Kagan had never been a judge. John Roberts had served as a federal judge for only two years, Amy Coney Barrett for only three. President Obama's long acquaintanceship with Kagan probably gave him a good sense of her views. Roberts's service in two Republican administrations provided considerable information about his conservative preferences, as did Barrett's association with the Federalist Society and her writings about issues of legal policy.[29] So long as leaders and activists in the two parties and their ideological allies continue to seek strongly liberal or strongly conservative nominees, we can expect presidents to focus on candidates whose records allow confident predictions about the general positions they would take as justices.

Political and Personal Reward

For most of the country's history, it was a standard practice for presidents to nominate friends and acquaintances to the Supreme Court. As of 1968, about 60 percent of nominees had known the nominating president personally.[30] Certainly this was true in the mid-twentieth century. With the exception of Dwight Eisenhower, all the presidents from Franklin Roosevelt through Lyndon Johnson selected mostly people whom they knew personally.

Rewarding personal and political associates seemed to be the main criterion for Harry Truman in choosing justices. Sherman Minton, a friend and former Senate colleague of Truman's, was serving as a federal judge in Indiana when he learned that one of the justices had died. Minton traveled to Washington, D.C. as quickly as he could, went to the White House, and asked Truman to nominate him for the vacancy. Truman immediately agreed, and Minton became a justice.[31]

Some appointments to the Court were, at least in part, rewards for political help. Eisenhower selected Earl Warren to serve as chief justice largely because of Warren's crucial support of Eisenhower at the 1952 Republican convention. As governor of California and leader of that state's delegation at the convention, Warren had provided Eisenhower the needed votes on a preliminary issue and thereby helped secure his nomination for the presidency.

This pattern has changed fundamentally. Of the twenty-seven nominees from Warren Burger in 1969 to Ketanji Brown Jackson in 2022, only Harriet Miers and Elena Kagan were acquainted with the presidents who chose them. Indeed, few nominees in that period had any contact with the president before they were considered for

the Court. For instance, after President Trump nominated Brett Kavanaugh, Trump told an audience that "I don't even know him. I met him for the first time a few weeks ago."[32]

Perhaps the main reason for the decline in the selection of personal acquaintances is that such nominees are vulnerable to charges of cronyism. That charge was made in 1968 when President Johnson nominated Justice Abe Fortas for elevation to chief justice and nominated federal judge Homer Thornberry to succeed Fortas as associate justice; both Fortas and Thornberry were personally close to Johnson. The charge played a small role in building opposition to Fortas and Thornberry in the Senate. Ultimately, Fortas's confirmation was blocked by a filibuster, and Thornberry's nomination thus became moot. Miers's nomination was also attacked as a case of cronyism, and that charge was one factor in the pressures that led to her withdrawal as a nominee.

One element of political reward has remained strong, however: about 90 percent of all nominees to the Court—and all those chosen since 1975—have been members of the president's party. One reason is that lawyers who share the president's policy views are more likely to come from the same party, especially in the current era. There is also a widespread feeling that such an attractive prize should go to one of the party faithful.

Building Political Support

Nominations can be made to reward people who helped the president in the past, but they can also be used to seek political benefits in the future. Most often, presidents select justices with certain attributes in order to appeal to leaders and voters who share those attributes.

Geography and religion were important criteria for selecting justices in some past eras, but their role in nominations has nearly disappeared. The decline of interest in maintaining geographical diversity is symbolized by the fact that four of the nine justices who served between 2010 and 2016 had grown up in New York City. Similarly, the decline of religion as a consideration is symbolized by the fact that the 2010–2016 Court included no Protestants, even though Protestants constitute a clear majority of people in the country who have religious affiliations.

In contrast, representation by race, gender, and ethnicity has become quite important. This is especially true of Democratic presidents because women and racial and ethnic minority groups are important to the Democratic political coalition. Lyndon Johnson chose the first Black justice (Thurgood Marshall), and Barack Obama chose the first Hispanic justice (Sonia Sotomayor). The three Democratic appointees on the current Court (Sotomayor, Elena Kagan, and Ketanji Brown Jackson) are women.

Joe Biden's campaign for the Democratic presidential nomination was floundering in early 2020, and the South Carolina primary election was a key to maintaining his chances of winning the nomination. In a debate a few days before the primary, he followed the urging of U.S. House member James Clyburn of South Carolina to pledge that he would appoint a Black woman to the Supreme Court. The pledge

secured Clyburn's endorsement of Biden the next day, and his support helped Biden win an overwhelming victory in the primary.[33] Biden adhered to that pledge by selecting Ketanji Brown Jackson in 2022, though she was not Clyburn's preferred candidate for the nomination.

To a lesser degree, considerations of race and gender affect Republican nominations as well. George H. W. Bush's nomination of Clarence Thomas to succeed Thurgood Marshall in 1991 reflected the pressure he felt to maintain Black representation on the Court. President Reagan felt even greater pressure to choose the first female justice, and he responded by selecting Sandra Day O'Connor as his first nominee. Almost surely, gender was one consideration in Trump's selection of Amy Coney Barrett to succeed Ruth Bader Ginsburg in 2020.

Senate Confirmation

A president's nomination to the Court goes to the Senate for confirmation. The nomination is referred to the Judiciary Committee, which gathers extensive information on the nominee, holds hearings at which the nominee and other witnesses testify, and then votes on its recommendation for Senate action. After this vote, the nomination is referred to the floor, where it is debated and a confirmation vote taken.

A simple majority is needed for confirmation. But until 2017, a large minority of senators (from 1975 on, forty-one) could block confirmation through a filibuster that used extended debate to prevent a vote on the nominee. That was the fate of Abe Fortas's nomination for chief justice in 1968. In 2017, after forty-five senators voted against ending the debate on the Gorsuch nomination, the Senate amended its rules to require only a simple majority to end debate on a Supreme Court nomination. It then voted to end debate on Gorsuch by a 55–45 vote. The vote on ending debate was overwhelmingly along party lines; the vote on amending the rules was entirely along party lines.

Overall, nominees' success in winning confirmation is best described as moderately good. Through 2022, by one count, twenty-nine nominations to the Supreme Court have not been confirmed—through an adverse vote, Senate inaction, or withdrawal of the nomination in the face of opposition.[34] These twenty-nine cases constitute nearly one-fifth of the nominations that have been submitted to the Senate. That rate of failure is far higher than the rate for nominations to the president's cabinet.

The overall success rate obscures wide variation over time. Twenty-two nominations failed in the nineteenth century, 30 percent of all nominations in that century. These failures had several different sources, including some presidents' political weakness, conflicts within the president's party, senators' disagreements with nominees' policy positions, and questions about nominees' qualifications.

In contrast, nominees did very well during the first two-thirds of the twentieth century. Between 1900 and 1967, only one nominee failed to win confirmation, Herbert Hoover's nominee John Parker in 1930. Only a few others faced a serious prospect of

defeat. Some other nominees drew more than ten negative votes, but the most common outcome was confirmation without even a recorded vote.

The period from 1968 to 1994 can be regarded as a transitional era. During that period, four nominees were defeated: Abe Fortas, nominated by Lyndon Johnson for elevation to chief justice in 1968; two nominees of Richard Nixon, Clement Haynsworth in 1969 and G. Harrold Carswell in 1970 (both for the same vacancy); and Ronald Reagan nominee Robert Bork in 1987. Some others faced significant opposition, and one—Clarence Thomas, nominated by George H. W. Bush in 1991—won confirmation by only a four-vote margin.

In contrast, most nominees during that period were confirmed with little difficulty, and five received unanimous approval from the Senate. In that period, as in the one that preceded it, senators usually voted to confirm the nominees chosen by presidents from the other party.[35] Still, even the nominees who faced little Senate opposition generally received closer scrutiny than those who were chosen earlier in the twentieth century. As Table 2.2 suggests, as late as the early 1960s, most nominees were confirmed without even a recorded vote. In contrast, no nominee after 1965 received that very favorable response from the Senate.

TABLE 2.2 ■ Senate Votes on Supreme Court Nominations since 1961

Nominee	Year	Vote
Byron White	1962	NRV
Arthur Goldberg	1962	NRV
Abe Fortas	1965	NRV
Thurgood Marshall	1967	69–11
Abe Fortas[a]	1968	No vote
Homer Thornberry	(1968)	No vote
Warren Burger	1969	74–3
Clement Haynsworth	1969	45–55
G. Harrold Carswell	1970	45–51
Harry Blackmun	1970	94–0
Lewis Powell	1971	89–1
William Rehnquist	1971	68–26
John Paul Stevens	1975	98–0
Sandra Day O'Connor	1981	99–0
William Rehnquist[b]	1986	65–33

(Continued)

TABLE 2.2 ■ Senate Votes on Supreme Court Nominations since 1961 *(Continued)*

Nominee	Year	Vote
Antonin Scalia	1986	98–0
Robert Bork	1987	42–58
Douglas Ginsburg	(1987)	No vote
Anthony Kennedy	1988	97–0
David Souter	1990	90–9
Clarence Thomas	1991	52–48
Ruth Bader Ginsburg	1993	96–3
Stephen Breyer	1994	87–9
John Roberts	2005	78–22
Harriet Miers	(2005)	No vote
Samuel Alito	2006	58–42
Sonia Sotomayor	2009	68–31
Elena Kagan	2010	63–37
Merrick Garland	(2016)	No vote
Neil Gorsuch	2017	54–45
Brett Kavanaugh	2018	50–48
Amy Coney Barrett	2020	52–48
Ketanji Brown Jackson	2022	53–47

Source: David G. Savage, *Guide to the U.S. Supreme Court*, 5th ed. (Washington, D.C.: CQ Press, 2010), 1253–1254; table updated by the author.

Note: NRV = no recorded vote.

a. Elevation to chief justice; nomination withdrawn after the Senate vote of 45–43 failed to end a filibuster against the nomination (two-thirds majority was required).

b. Elevation to chief justice.

There were no vacancies on the Court between 1994 and 2005. The nomination of John Roberts in 2005 marked the beginning of the current era. From Roberts through Ketanji Brown Jackson in 2022, nine nominees were considered by the Senate. Of the nine, only Merrick Garland in 2016 failed to win confirmation. But half of the Democratic senators voted against Roberts, and all the other nominees during that period fared much worse with the opposition party. No nominee during this period

received more than one negative vote from the nominee's party, but none after Roberts received more than nine positive votes from the other party. And the four most recent nominees—Gorsuch, Kavanaugh, Barrett, and Jackson—received an average of two positive votes from the opposition side. This pattern of votes marks a new era of unusually sharp partisan conflict over confirmation.[36]

Although earlier eras should be kept in mind, I will focus on the two most recent eras. What did those eras look like, and what brought them about?

The Transitional Era: 1968–1994

In the 1950s and the 1960s, under Chief Justice Earl Warren, the Supreme Court made several major decisions expanding constitutional protections of civil liberties. There was considerable opposition to the Court's general direction and to some specific decisions, especially those in criminal justice. Some members of Congress denounced the Court, and the Court became an issue in the presidential elections of 1964 and 1968. But the Warren Court also had its defenders, people who strongly approved of the Court's work.

The Court's higher profile and the debate over its policies set the stage for increased conflict over confirmations of presidential nominees. The growth in activity by interest groups that cared about the Court's policies intensified this conflict. As a result, it became common for nominees to draw serious opposition. The more intense scrutiny that nominees received in the Senate is indicated by the length of the process: the median time between submission of a nomination to a Senate and its final action was seventy-one days during this transitional period, compared with fifteen days between 1937 and 1965.[37] In 1990, George H. W. Bush nominee David Souter became upset about what he called a "vicious" confirmation process, and his friend and sponsor Senator Warren Rudman had to block him from getting to a phone to call the president and withdraw his nomination.[38]

As the votes in Table 2.2 indicate, there was wide variation in senators' responses to different nominations during the transitional era. This variation reflected whether the president's party had majority control of the Senate, whether confirmation of the nominee seemed likely to change the ideological balance on the Court, and factors that were specific to individual nominees or to the situations in which they were nominated.

The impact of these conditions is illustrated by the unanimous confirmation of Antonin Scalia in 1986 and the defeat of Robert Bork the next year. Both nominees of Republican President Ronald Reagan had been well-regarded legal scholars and held conservative views. One difference was that the Senate was under Republican control in 1986 and Democratic control in 1987. Another was that Bork seemed more likely than Scalia to move the Court to the right. Bork's writings about issues of legal policy provided a basis for opponents to label him as an extremist, a basis that was lacking for Scalia. And Scalia got something of a free pass because Democrats concentrated their opposition on William Rehnquist, who had been nominated for promotion to chief justice at the same time Scalia was nominated to be an associate justice.

Another pair of nominees who illustrate the impact of these conditions is David Souter and Clarence Thomas, chosen by Republican president George H. W. Bush in 1990 and 1991. There were Democratic majorities in the Senate in both years, and each nominee would replace a highly liberal justice. But Souter won confirmation with only nine negative votes, while Thomas won by a 52–48 margin. Thomas's past policy positions indicated that he was a strong conservative, while Souter's more limited record suggested he was more moderate. Both nominees received opposition from liberal interest groups, but the opposition to Thomas was broader and more intense. It became even more intense after an allegation of sexual harassment was made against Thomas, and a second set of committee hearings was convened to investigate the allegation. Ultimately Thomas received just enough support from Senate Democrats to win confirmation.

Robert Bork was one of the four nominees who failed to win confirmation during this transitional period. The other three defeats came near the beginning of the period. The first was Abe Fortas, a sitting justice whom President Johnson nominated to be chief justice in 1968. The Senate had a Democratic majority. But many of the Democrats were conservative, and the strong liberalism of the Warren Court and of Fortas himself aroused conservative opposition. Further, the nomination came in the last year of Johnson's term, and historically, last-year nominees have been successful less than 60 percent of the time.[39] Indeed, in 1968 half the Republican senators signed a statement saying that they would vote against confirming any Johnson nominee in his last year.[40]

Opponents of Fortas questioned his ethical fitness on two grounds: his continued consultation with President Johnson about policy matters while serving on the Court and an arrangement by which he gave nine lectures at American University in Washington, D.C., for a fee of $15,000 that was contributed by businesses. After the nomination went to the full Senate, it ran into a filibuster. A vote to end debate fell fourteen votes short of the two-thirds majority then required; the opposition came almost entirely from Republicans and southern Democrats. President Johnson then withdrew the nomination at Fortas's request.

Fortas resigned from the Court in 1969. Republican President Richard Nixon selected Clement Haynsworth, chief judge of a federal court of appeals, to replace Fortas. Haynsworth was opposed by civil rights and labor groups on the basis of his judicial record. Liberal senators, unhappy about that record themselves, sought revenge for Fortas's defeat for chief justice as well. Haynsworth was also charged with unethical conduct: he had sat on two cases involving subsidiaries of companies in which he owned stock, and in another case he had bought the stock of a corporation in the interval between his court's vote in its favor and the announcement of that decision. These charges led to additional opposition from Senate moderates. Haynsworth ultimately was defeated by a 45–55 vote, with a large minority of Republicans voting against confirmation.

President Nixon then nominated another court of appeals judge, G. Harrold Carswell. After the fight over Haynsworth, most senators were inclined to support the next nominee. One senator predicted that any new Nixon nominee "will have no trouble getting confirmed unless he has committed murder—recently."[41] But Carswell drew opposition from civil rights groups, and their cause gained strength from a series of revelations about the nominee that suggested active opposition to racial equality. Carswell was also charged with a lack of judicial competence. After escorting Carswell to talk with senators, one of Nixon's staffers reported to the president that "they think Carswell's a boob, a dummy. And what counter is there to that? He is."[42] The nomination was defeated by a 45–51 vote, with a lineup similar to the vote on Haynsworth.

The four defeats during the transitional period have some things in common. In each instance, many senators were inclined to oppose the nominee on ideological grounds. All but Fortas faced a Senate controlled by the opposite party, and Fortas was confronted by a conservative Senate majority. And each nominee was weakened by a "smoking gun" that provided a basis for opposition: the ethical questions about Fortas and Haynsworth, the allegations of racism and incompetence against Carswell, and the charge that Bork was outside the mainstream in his views on judicial issues. The combination of these problems led to enough negative votes to prevent confirmation in each instance.

The Era of Sharp Conflict: 2005 to the Present

President Bill Clinton's nominations of Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994 were the last ones made in the transitional era. Several conditions favored easy confirmations for Ginsburg and Breyer: the Senate had a Democratic majority, the nominees were well-regarded judges, and neither was expected to change the Court's ideological balance very much. As a result, efforts to mount opposition to these nominees had little success. Ginsburg was confirmed with three negative votes, Breyer with nine.

When George W. Bush nominated John Roberts as chief justice in 2005, the same conditions seemed equally favorable. The Senate had a moderately large Republican majority, Roberts had been an impressive advocate in the Supreme Court as a lawyer before his service as a judge, and he made a favorable impression in his confirmation hearing. He was perceived as distinctly conservative, but so was the chief justice he would succeed, William Rehnquist. Yet half the Democratic senators voted against confirmation.

What had changed? The best single answer is that the growing polarization in politics was having a powerful effect on the Senate and thus on the confirmation process. Liberal Republicans and conservative Democrats had largely disappeared from the Senate, moderates had become more scarce, and hostility between the parties had increased. Senators were also feeling stronger pressure from interest groups associated with their party, groups that wanted them to oppose nominees from the other party.

That pressure was enhanced by increased militancy among the parties' voters and activists: in many states, especially Republican states, a senator who voted to confirm a nominee from the other party risked defeat in a party primary. Also important was the continuing close balance between conservatives and liberals on the Court.

When Harriet Miers withdrew a few weeks after Bush nominated her to succeed Sandra Day O'Connor in 2005, that withdrawal reflected another aspect of polarization: the demand from groups associated with the Republican Party for a nominee whose strong conservatism was unquestionable. Bush's subsequent nomination of Samuel Alito for the same seat pleased those groups, and that nomination demonstrated their influence on Republican presidents.

Alito's strong conservatism and the prospect that he would move the Court to the right led to opposition from liberal interest groups that was successful in mobilizing Democratic senators. But Alito's opponents could find nothing negative about him that would turn Republican senators against the nominee. Because Alito did not have the support of sixty senators, Democratic opponents could have mounted a filibuster against him. But many Democratic senators saw a filibuster as inappropriate or at least bad political strategy. After a 75–25 vote to end debate, Alito won confirmation by a 58–42 margin. One Republican and all but four Democrats voted against him.

Sonia Sotomayor entered the confirmation process with the great advantage of a Democratic majority in the Senate and the additional advantage that her replacement of David Souter was unlikely to change the Court's overall ideological balance very much. Still, some Senate Republicans joined conservative interest groups in expressing strong opposition to Sotomayor. She had said in one talk, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[43] Opponents argued that this passage and other statements and actions indicated a lack of impartiality on her part. They also charged that some of her positions in court of appeals decisions were unduly liberal and departed from good interpretations of the law. None of these criticisms constituted the kind of smoking gun that might have attracted Democratic opposition to the nomination. Indeed, no Democratic senator voted against Sotomayor. But the great majority of Republicans—thirty-one of forty—cast negative votes.

Elena Kagan benefited from the same Democratic majority as Sotomayor. And like Sotomayor, she was not expected to alter the ideological balance of the Court substantially. Indeed, some liberals complained that she was probably less liberal than Republican appointee John Paul Stevens, the justice she would succeed. Yet Kagan still faced widespread opposition from Senate Republicans and conservative interest groups. Opponents cited her lack of judicial experience and her limited experience as a practicing lawyer. They found evidence of what they saw as strongly liberal views. Republicans were especially critical of her actions as dean at Harvard Law School that limited the access of military recruiters to law students because of the military's prohibition of service by openly gay and lesbian people. Ultimately, Kagan won

confirmation with even less Republican support than Sotomayor, with thirty-six of forty-one Republicans (and a single Democrat) voting against her.

The defeat of Merrick Garland in 2016 underlined how conditions had changed. Because this was the last year of President Obama's term, he could have expected that any nominee he chose would face close scrutiny from the Republican majority in the Senate. This was especially true because an Obama appointee to succeed Antonin Scalia was likely to create the first liberal majority on the Court since the early 1970s. The Republican Senate leadership acted preemptively, announcing shortly after Scalia's death in February 2016 that no Obama nominee would be considered by the Senate. Obama chose Garland in an effort to win support among Republicans: Garland was well respected and relatively moderate, and his age (sixty-three) made it likely that his tenure would be shorter than that of the average justice. But all the Republican senators held firm: no hearings were held and no vote ever taken. Any prospect of confirmation ended when Hillary Clinton was defeated in the presidential election.

Neil Gorsuch, nominated by Donald Trump in 2017 to succeed Antonin Scalia, had a strong conservative record as a federal court of appeals judge. His selection by a Republican president and his conservatism virtually guaranteed that nearly all Senate Republicans would vote to confirm him. That conservatism and bitterness over the treatment of Merrick Garland guaranteed that nearly all Democrats would vote no. Opponents of Gorsuch, facing a small Republican Senate majority, could not provide a persuasive reason for the few moderate Republicans to vote against confirmation. Ultimately, all the Senate's Republicans (except one who was absent for health reasons) voted for Gorsuch, and three Democrats joined them; the vote was 54–45.

Opposition to Brett Kavanaugh's confirmation to succeed Anthony Kennedy in 2018 was intense from the start because of the perception that Kavanaugh would move the Court to the right and because some Democrats viewed him as a Republican partisan. The regular committee hearing on the nomination was punctuated by Democrats' complaints that documents related to Kavanaugh's work in the George W. Bush administration had not been released and their charges that Kavanaugh had not been fully truthful about that work. But there were no signs of Republican defections.

As Kavanaugh moved toward confirmation, a charge that he had committed sexual assault while he was in high school emerged. The Judiciary Committee held a second hearing on the charge, and the Federal Bureau of Investigation (FBI) carried out a limited investigation of that charge and a second one from Kavanaugh's college years. Ultimately, the charges had little effect on senators' positions: Kavanaugh was confirmed by a two-vote margin, with a favorable vote from one Democratic senator. One Republican was prepared to vote against him but abstained as a courtesy to a pro-confirmation Republican who could not be present for the vote.

Opposition to Amy Coney Barrett, nominated by President Trump in 2020, was even more intense for two reasons. First, she would succeed Ruth Bader Ginsburg, and her perceived strong conservatism would establish a strong six-justice conservative

majority on the Court. Second, the Republican Senate leadership had refused to consider an Obama nominee after Antonin Scalia's death in February 2016 on the ground that no nominee should be confirmed when a vacancy occurred during a presidential election year, but that leadership was determined to consider Barrett and confirm her quickly after Ginsburg died in September 2020. She *was* confirmed quickly, less than six weeks after Ginsburg's death. All but one Republican senator voted for confirmation, assuring her confirmation. But every Democrat voted against Barrett, making her the first justice in 150 years to win confirmation with no affirmative votes from the opposition party.

The course of confirmation for Ketanji Brown Jackson in 2022 is a very good illustration of confirmation politics in the current era. Most senators probably perceived that Jackson would take more liberal positions in cases than her predecessor Stephen Breyer, but her presence on the Court would not disturb its solid conservative majority. She also appeared to be highly qualified. In the transitional period, almost surely there would have been few votes against her in the Senate. But only three Republicans voted for her, and Republicans on the Judiciary Committee strongly attacked Jackson on issues such as criminal justice that might resonate with voters.

Jackson did not need any Republican votes, because Democrats controlled the Senate by the slimmest of margins—a 50–50 split in which Vice President Kamala Harris could cast the decisive vote—and every Democrat voted for her. In contrast with the transitional era, the growth in partisan polarization almost guarantees that few if any senators from the president's party will vote against confirmation. By the same token, it is uncertain whether the Senate would even have considered the Jackson nomination had its leadership been Republican rather than Democratic. Party control of the Senate has become even more critical for confirmation of nominees than it was in earlier eras.

WHO IS SELECTED

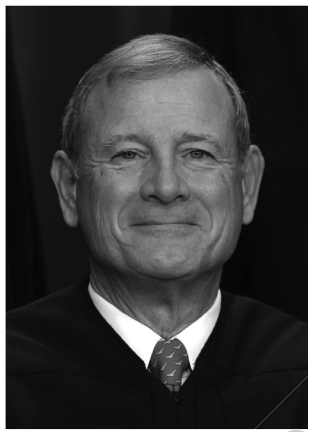
The attributes of the people who become Supreme Court justices reflect the criteria that presidents use to select nominees. In turn, those attributes shape the collective choices that the Court makes. They also affect perceptions of the Court. Justice Kagan, for instance, has said that diversity in the justices' backgrounds "allows people to identify" with the Court.[44] Thus, it is important to know what kinds of people reach the Court, and why.

Career Paths

One way to understand the collective attributes of justices is by tracing the paths that people take to get to the Court. These paths have changed over time. In this section, I give primary attention to the justices who have been appointed since 1969, a distinctive group in comparison with justices from earlier periods. The current justices are of

particular interest, and Box 2.1 summarizes the careers of the justices who sat on the Court in 2022–2023.[45]

BOX 2.1: CAREERS OF THE SUPREME COURT JUSTICES, 2022–2023



Alex Wong/Getty Images

John G. Roberts Jr. (born 1955)

Undergraduate degree, Harvard University, 1976

Law degree, Harvard University, 1979

Law clerk, U.S. Court of Appeals, 1979–1980

Law clerk, Supreme Court, 1980–1981

U.S. Justice Department, 1981–1982

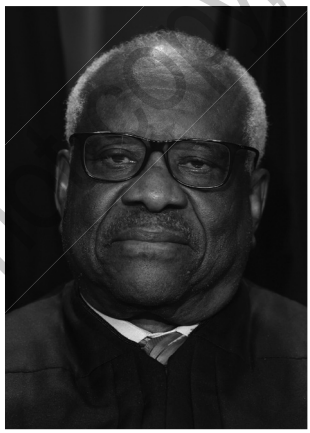
Office of White House Counsel, 1982–1986

U.S. Office of the Solicitor General, 1989–1993

Private law practice, 1986–1989, 1993–2003

Judge, U.S. Court of Appeals, 2003–2005

Appointed chief justice, 2005



Alex Wong/Getty Images

Clarence Thomas (born 1948)

Undergraduate degree, College of the Holy Cross, 1971

Law degree, Yale University, 1974

Missouri attorney general's office, 1974–1977

Attorney for Monsanto Company, 1977–1979

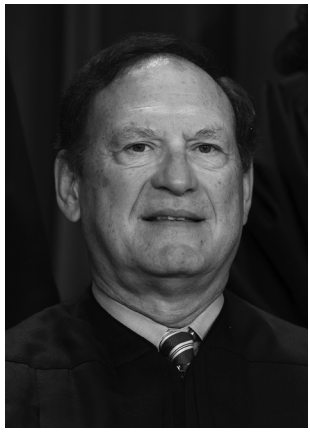
Legislative assistant to a U.S. senator, 1979–1981

Assistant U.S. secretary of education, 1981–1982

Chair, U.S. Equal Employment Opportunity Commission, 1982–1990

Judge, U.S. Court of Appeals, 1990–1991

Appointed to Supreme Court, 1991



Alex Wong/Getty Images

Samuel A. Alito Jr. (born 1950)

Undergraduate degree, Princeton University, 1972

Law degree, Yale University, 1975

Law clerk, U.S. Court of Appeals, 1976–1977

Assistant U.S. attorney, 1977–1981

U.S. Office of the Solicitor General, 1981–1985

U.S. Justice Department, 1985–1987

U.S. attorney, 1987–1990

Judge, U.S. Court of Appeals, 1990–2006

Appointed to Supreme Court, 2006

Alex Wong/Getty Images

Sonia Sotomayor (born 1954)

Undergraduate degree, Princeton University, 1976

Law degree, Yale University, 1979

Assistant district attorney, 1979–1984

Private law practice, 1984–1992

Judge, U.S. District Court, 1992–1998

Judge, U.S. Court of Appeals, 1998–2009

Appointed to Supreme Court, 2009

Alex Wong/Getty Images

Elena Kagan (born 1960)

Undergraduate degree, Princeton University, 1981

Law degree, Harvard University, 1986

Law clerk, U.S. Court of Appeals, 1986–1987

Law clerk, Supreme Court, 1987–1988

Private law practice, 1989–1991

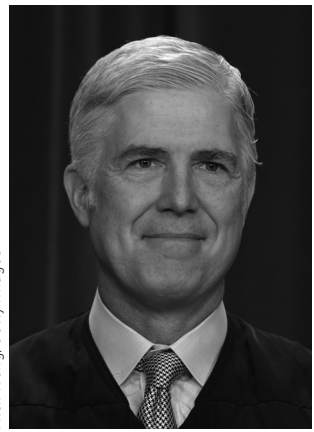
Law school teaching, 1991–1995

Positions in executive branch, 1995–1999

Law school teaching and administration, 1999–2009

U.S. Solicitor General, 2009–2010

Appointed to Supreme Court, 2010



Alex Wong/Getty Images

Neil Gorsuch (born 1967)

Undergraduate degree, Columbia University, 1988

Law degree, Harvard University, 1991

Law clerk, U.S. Court of Appeals, 1991–1992

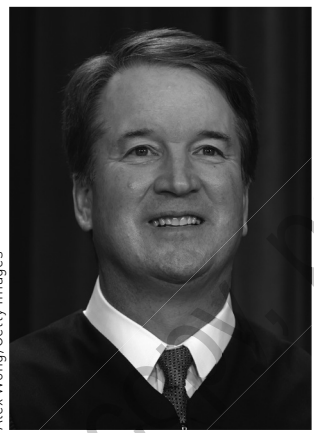
Law clerk, Supreme Court, 1993–1994

Private law practice, 1995–2005

U.S. Justice Department, 2005–2006

Judge, U.S. Court of Appeals, 2006–2017

Appointed to Supreme Court, 2017



Alex Wong/Getty Images

Brett Kavanaugh (born 1965)

Undergraduate degree, Yale University, 1987

Law degree, Yale University, 1990

Law clerk, U.S. Court of Appeals, 1990–1992

U.S. Office of the Solicitor General, 1992–1993

Law clerk, Supreme Court, 1993–1994

Associate independent counsel, investigation of President Clinton, 1994–1997, 1998

Private law practice, 1997–1998, 1999–2001

Office of White House Counsel, 2001–2003

Assistant to the president, 2003–2006

Judge, U.S. Court of Appeals, 2006–2018

Appointed to Supreme Court, 2018

Alex Wong/Getty Images

Amy Coney Barrett (born 1972)

Undergraduate degree, Rhodes College, 1994

Law degree, University of Notre Dame, 1997

Law Clerk, U.S. Court of Appeals, 1997–1998

Law clerk, Supreme Court, 1998–1999

Private law practice, 1999–2001

Law faculty member, 2001–2017

Judge, U.S. Court of Appeals, 2017–2020

Appointed to Supreme Court, 2020

Alex Wong/Getty Images

Ketanji Brown Jackson (born 1970)

Undergraduate degree, Harvard University, 1992

Law degree, Harvard University, 1996

Law clerk, U.S. District Court, 1996–1997

Law clerk, U.S. Court of Appeals, 1997–1998

Law clerk, U.S. Supreme Court, 1999–2000

Private law practice, 1998–1999, 2000–2003, 2007–2010

Assistant special counsel, U.S. Sentencing Commission, 2003–2005

Assistant federal public defender, 2005–2007

Vice chair, U.S. Sentencing Commission, 2010–2013

Judge, U.S. District Court, 2013–2021

Judge, U.S. Court of Appeals, 2021–2022

Appointed to Supreme Court, 2022

Source: Biographical Directory of Federal Judges, Federal Judicial Center, https://www.fjc.gov/history/judges.

Note: Only the primary position held by a future justice during each career stage is listed.

The Legal Profession

The Constitution specifies no requirements for Supreme Court justices, so they need not even be attorneys. In practice, however, this restriction has been absolute. Thus, a license to practice law constitutes the first and least flexible requirement for recruitment to the Court. Most justices who served during the first century of the Court's history took what was then the standard route, apprenticing under a practicing attorney. In several instances, the practicing attorney was a leading lawyer. James Byrnes (chosen in 1941) was the last justice to study law through apprenticeship. All the people appointed since then—like nearly all people who became lawyers over the last several decades—had graduated from law school.

A high proportion of justices were educated at prestigious law schools. This has been especially true in the current era. From Antonin Scalia in 1986 through Brett Kavanaugh in 2018, all twelve appointees to the Court went to the law schools at Harvard or Yale. (Ruth Bader Ginsburg received her law degree from Columbia after spending her first two years at Harvard.) That string was broken in 2020 by Amy

Coney Barrett, who studied law at Notre Dame, but 2022 appointee Ketanji Brown Jackson went to Harvard. It may be that as scrutiny of nominees has increased, presidents have thought it desirable to choose people whose attendance at leading law schools suggests a high level of qualifications.

High Positions

If legal education is a necessary first step in the paths to the Court, almost equally important as a last step is attaining a high position in government or the legal profession. Obscure private practitioners or state trial judges might be superbly qualified for the Court, but their qualifications would still be questioned. A high position also makes a person more visible to the president and to the officials who identify potential nominees.

At the time they were selected, the twenty justices appointed since 1969 were a fairly homogeneous group. Sixteen of the twenty were sitting on a federal court of appeals, and a seventeenth (Sandra Day O'Connor) was a state appellate judge. Lewis Powell and William Rehnquist, both appointed in 1971, were not sitting judges; neither had any judicial experience. Rehnquist was an assistant attorney general in the Nixon administration, and Powell was in private practice. Powell was a distinguished lawyer who had served as president of the American Bar Association, and Rehnquist's position in the Justice Department made him a credible candidate for appointment to the Supreme Court.

Elena Kagan, appointed in 2010, also lacked judicial experience. She had been dean of the law school at Harvard and then served as solicitor general for a year. That service in the office that represents the federal government in the Supreme Court gave her an important credential for a Court appointment.

The Steps Between

The people who have become Supreme Court justices took a variety of routes from their legal education to the high positions that made them credible candidates for the Court. Powell, Rehnquist, and Kagan illustrate one simple route: entry into legal practice or academia, followed by a gradual rise to high standing in the legal profession or in government.

Since 1969, the most common route to the Court has been through private practice or law teaching, often combined with some time in government, before appointment to a federal court of appeals. Antonin Scalia, Ruth Bader Ginsburg, Stephen Breyer, and Amy Coney Barrett were law professors. Anthony Kennedy and John Roberts were in private practice. Before becoming judges, all six held government positions or participated informally in the governmental process. Neil Gorsuch was in private practice until he took a Justice Department position; a year later, he received a court of appeals appointment. Sonia Sotomayor left private practice to become a federal district judge and was later elevated to a court of appeals.

TABLE 2.3 ■ Selected Career Experiences of Justices Appointed since 1937 (in percentages)

Years appointed	Experience during career		
	Elective office	Head of federal agency	Judgeship
1937–1968	38	29	48
1969–2022	5	5	85
	Position at appointment		
1937–1968	19	29	29
1969–2022	0	0	85

Source: *Biographical Directory of Federal Judges*, Federal Judicial Center, https://www.fjc.gov/history/judges.

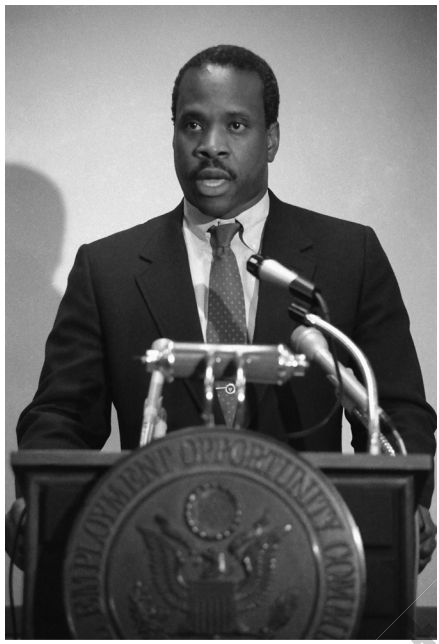
Note: Federal agencies include cabinet departments and independent agencies. Heads of offices within departments (e.g., the Office of the Solicitor General in the Justice Department) are not counted.

Sandra Day O'Connor took a unique path to the Court. She spent time in private practice and government legal positions, with some career interruptions for family responsibilities, before becoming an Arizona state senator and majority leader of the state senate. O'Connor left the legislature for a trial judgeship. Her promotion to the state court of appeals through a gubernatorial appointment put her in a position to be considered for the Supreme Court.

Changes in Career Paths

The justices who have been appointed since 1969 stand out from their predecessors in their career paths. Some of those differences are described in Table 2.3. The table shows that even within the period since 1937, there have been striking changes in justices' pre-Court careers. These changes did not happen abruptly, but they are illustrated by comparison of the justices who were appointed between 1937 and 1968 and the justices chosen since then. That comparison is shown in Table 2.3.

In their career backgrounds, the twenty-one justices appointed to the Court between 1937 and 1968 were fairly typical of those selected in earlier periods. About half had judicial experience, nearly two in five had held elective office, and more than a quarter had headed a federal administrative agency. In contrast, all but three of the twenty justices who arrived at the Court during the period from 1969 through 2022 came to the Court from other judgeships. They also differed from their predecessors in their limited experience in



AP Photo/Mark Elias

Clarence Thomas, chair of the Equal Employment Opportunity Commission, announces the settlement of a lawsuit in 1987. Of the justices who have been appointed to the Court since 1969, Thomas is the only one with experience heading a federal administrative agency.

the other branches of government. Only Sandra Day O'Connor had ever held elective office, only Clarence Thomas had headed a federal agency, and several had spent little or no time in the legislative or executive branches.

Another way to describe the difference between the two periods is in terms of the proportion of justices' pre-Court careers that were spent in what might be called the legal system—private practice, law school teaching, and the courts. The median proportion for the justices appointed between 1937 and 1968 was 67 percent, while the median for the 1969–2022 appointees was 85 percent.[46] The high proportion for the period since 1969 is all the more striking because the Roberts Court justices collectively had spent less time in private practice than did the justices of any prior era. It is teaching and the courts that account for the prominence of the legal system in the backgrounds of recent justices.[47]

The dominance of lower-court judgeships in the current era merits emphasis, especially because several appointees had served as judges for a substantial part of their pre-Court careers. One reason for this development is that service as a judge, especially on a federal court of appeals, is increasingly viewed as a qualification for appointment to the Supreme Court. Harriet Miers in 2005 and Elena Kagan in 2010 were criticized for the absence of judicial experience.

More important, a substantial judicial record helps presidents and their advisors to predict the positions that prospective nominees might take as justices. In an era in which most presidents care a great deal about the Court's direction, any help in making these predictions is valued. Service on a federal court of appeals is especially helpful in prediction because the courts of appeals are the most similar to the Supreme Court in the kinds of issues they address.

The changes in paths to the Court may affect the justices' perspectives and their thinking about legal issues. For instance, the absence of experience in the legislative branch among most recent justices may affect their thinking about how to interpret statutes. But the relationship between justice's career paths and their approaches to decision making undoubtedly is more complicated than straightforward.

Other Attributes of the Justices

Career experience is only one important characteristic of the people who become justices. Other attributes can be understood partly in terms of the career paths that take people to the Court.

Age

Since 1969, a majority of Supreme Court justices have been in their fifties at the time of their appointments and the rest in their forties or early sixties. The median age at appointment was fifty-one. Clarence Thomas was the youngest appointee, at age forty-three. At the other end of the spectrum, Lewis Powell was sixty-four.

The ages of Court appointees reflect a balance between two considerations. On the one hand, lawyers need time to develop the record of achievement that makes them credible candidates for the Court. On the other hand, presidents would like their appointees to serve for many years in order to achieve the maximum impact on the Court. That second consideration has been especially important in recent years: beginning with Stephen Breyer in 1994, no justice has been over fifty-five years old at the time of appointment.

Partisan Political Activity

Even though today's justices spent the bulk of their pre-Court careers in the legal system, most shared with their predecessors some involvement in partisan politics. Six of the 2022–2023 justices served in presidential administrations. Clarence Thomas worked with John Danforth when Danforth was the Missouri attorney general and a U.S. senator. Prior to his five years of service in the George W. Bush administration, Brett Kavanaugh was on the staff of independent counsel Kenneth Starr for the investigation of Bill Clinton that led to his impeachment.

This pattern reflects the criteria for selecting justices. Even when nominations to the Court are not used as political rewards, presidents look more favorably on people who have contributed to their party's success. Partisan activity also brings people to the attention of presidents, their staff members, and others who influence nomination decisions. Perhaps most important, it helps in winning the high government positions that make people credible candidates for the Court.

Economic Status, Race, and Sex

For most of its history, the Supreme Court's membership diverged sharply from the general population in regard to race, sex, and family economic status. Before 1967, every justice was white. The first woman joined the Court in 1981. Most of the justices who were appointed prior to 1937 grew up in families that were relatively well off during their childhoods. One study found that about 40 percent of the justices in that long period were from high-income families and more than one-quarter from upper

middle-income families. Only about 15 percent were from lower middle-income or low-income families.[48]

Those patterns are not difficult to understand. Because of various restrictions, some quite severe, women and members of racial minority groups long had enormous difficulty in obtaining a legal education and a license to practice law. As a result, few members of these groups met the first criterion for selection. Among those who did meet that criterion, discrimination greatly limited their ability to advance in the legal profession and in politics. As a result, very few individuals who were not white men could achieve the high positions that people generally must obtain to be considered for nomination to the Court—let alone actually getting a nomination.

People from low-income families had their own disadvantages. Perhaps most important, obtaining a legal education is easiest for people from high-income families because of the cost of law school and the college education that precedes it. Early in the Court's history, when most justices had apprenticed with an attorney, people from advantaged families had the best opportunity to apprentice with leading lawyers.

In each of these respects, there has been considerable change in the Court. Ketanji Brown Jackson is the sixth woman to join the Court, and her appointment in 2022 gave the Court four female members. Three Black justices have served on the Court, and Jackson and Clarence Thomas are serving together alongside the Latina Sonia Sotomayor. Since 1937, justices who grew up in upper-class families have become much less common, and a substantial minority of justices have come from families that were in the lower-middle class or below that economic level. In his early childhood, Thomas lived in poverty.

This newer pattern reflects significant changes in politics and society. Levels of discrimination based on race and sex have declined, both in general and in higher education. Opportunities for people from lower-income families to get undergraduate and legal educations through financial assistance have increased.

As the Court has moved away from the long-standing monopoly of white men on the Court, and as fewer justices have come from high-income families, how have these changes affected the Court's policies? People who do not share the traditional attributes of justices might bring new perspectives to the Court, and these perspectives might influence the thinking of their colleagues. For instance, both Ruth Bader Ginsburg and Sandra Day O'Connor expressed their view that the presence of female justices affected the Court's collective judgments in some cases.[49] On the other hand, Elena Kagan has cautioned against exaggerating the impact of gender: "Justice Barrett and I, we agree about some things and we disagree about some things and being a woman just doesn't have all that much to do with it."[50]

Indeed, justices with similar backgrounds or life experiences may develop very different points of view. As Sonia Sotomayor said, "You would think that Clarence Thomas and I would be more similar, wouldn't you, if you looked just at our

background and upbringing."[51] Perhaps most striking is the fundamental disagreement between the two justices about the legality and desirability of affirmative action in college admissions, disagreement that they expressed in strong terms in their opinions in *Students for Fair Admissions v. President and Fellows of Harvard College* (2023). The justices with relatively humble family backgrounds have included conservatives such as Thomas and Warren Burger as well as liberals such as Sotomayor and Earl Warren.

One attribute shared by all the justices is that they have achieved high status in their own lives. This does not mean that they were all very well off when they joined the Court. Among others, Clarence Thomas and Sonia Sotomayor had limited financial resources. But most justices *were* well off. Based on information in the justices' financial disclosures, two journalists determined in 2023 that "at least six of the Supreme Court justices are multimillionaires."[52] Some of the justices, including Thomas and Sotomayor, have improved their financial status considerably with book royalties during their tenure on the Court.

Summing up the Justices' Backgrounds

In terms of race and sex, the current Court is the most diverse in history. It is also fairly diverse in terms of economic backgrounds. In those respects, the Court resembles the general public to a considerable degree.

In contrast, the lives of the justices from college to the time of their appointment set them apart from the general public. Put simply, they are an elite group. The great majority of college students attend public institutions. In contrast, all nine of the 2022–2023 justices graduated from private undergraduate schools, including seven who went to Ivy League schools. (The last justice who went to a public college, Byron White, was appointed in 1962.) Inevitably, the justices differ from most other people in that they are lawyers. Still, it is striking that eight of the nine justices in 2022–2023 went to law school at Harvard or Yale. And after law school, justices in the current era embarked on career paths that took them to high levels in the legal profession. For six of the current justices, those paths included Supreme Court clerkships that provide young lawyers with an enormous boost in their careers.

Justices in the current era are relatively homogeneous in some other respects as well. Of the justices appointed since 1969, only one had ever run for elective office, and only one had headed a federal administrative agency. It has been nearly as rare for a justice to come to the Court without judicial experience, and the overwhelming majority served on a federal court of appeals when they were appointed to the Court.

Some commentators have argued that these patterns in the backgrounds of the justices have undesirable consequences. For instance, legal scholar Benjamin Barton said that "the hyper elite group of Justices we have now are a poor match for the role we ask the Court to play in our democracy."[53] But whether these patterns are good, bad,

or a mix of the two, it is likely that they exert some impact on the justices' choices as decision makers.

The Role of Chance

No one becomes a Supreme Court justice through an inevitable process. Rather, advancement from membership in the bar to a seat on the Court results from luck as much as anything else. This luck comes in two stages: achieving the high positions in government or law that make individuals possible candidates for the Court and then getting serious consideration for the Court and actually winning an appointment. The role of luck in the first stage is illustrated by the highly improbable sequence of events that led to Stephen Breyer's appointment to a federal court of appeals in 1980, an appointment that put Breyer in a position to win elevation to the Supreme Court in 1994.[54]

In the second stage, a potential justice gains enormously by belonging to a particular political party at the appropriate time. Every appointment to the Court between 1969 and 1992 was made by a Republican president. As a result, a whole generation of potential justices who were liberal Democrats had essentially no chance to win appointments. Further, someone whose friend or associate achieves a powerful position becomes a far stronger candidate for a seat on the Court. Elena Kagan accomplished a great deal in her career, culminating in her appointment as dean at the Harvard Law School. But if she had not known Barack Obama, there is little chance that she would have become solicitor general and then won a Supreme Court appointment. When Kagan arrived for her interview by President Obama in 2010, shortly before he appointed her to the Court, he was busy dealing with a new crisis arising from a massive oil spill. He told her, "I know you. We don't have to talk, right?"[55]

More broadly, everyone appointed to the Court has benefited from a favorable series of circumstances that build on each other. This does not mean that the effects of presidential appointments to the Court are random. Presidents and their aides increasingly make systematic efforts to identify the nominees who serve their goals best. But it does mean that specific individuals achieve membership on the Court through good fortune. As Kagan said, "It's a lot of chance that the nine of us are there rather than nine other people."[56]

LEAVING THE COURT

Opportunities to appoint new justices enable presidents to shape the Court's membership and influence the policies it makes. In the Supreme Court's first century, those opportunities sometimes arose from legislation that increased the Court's size to allow new appointments. With the Court's size set at nine members for more than 150 years, that option is essentially gone. In 2021 and 2022, some Democrats argued

for expansion of the Court as a means to counterbalance President Trump's appointments to the Court with appointments by President Biden, but their proposals came nowhere near enactment. Today, new members come to the Court only when a sitting justice departs.

Justices leave the Court involuntarily if they die or if they are removed through impeachment proceedings. In contrast with the nineteenth century, few justices in the past several decades have stayed on the Court until death. William Rehnquist, Antonin Scalia, and Ruth Bader Ginsberg are the only justices to die in office since Robert Jackson in 1954. And no justice has ever left the Court through impeachment proceedings. Thus, justices' Court tenure usually ends through their own decisions, though external pressures sometimes play a role in those decisions.

As Table 2.4 shows, over the last several decades, justices have left the Court for a variety of reasons. One reason that has largely disappeared is the attraction of another position. In past eras, some justices did resign to seek or take another office. For instance, Charles Evans Hughes resigned to become the Republican nominee for president in 1916. (He lost the general election; fourteen years later he rejoined the Court as chief justice.) But the only justice to leave the Court for another position since 1942 was Arthur Goldberg, who resigned in 1965 to become U.S. ambassador to the United Nations. Goldberg did so with great reluctance,

TABLE 2.4 ■ Reasons for Leaving the Court Since 1965

Year	Justice	Age	Primary reasons for leaving (aside from interest in affecting Court's ideological balance)	Length of time from leaving until death
1965	Goldberg	56	Appointment as ambassador to the United Nations	24 years
1967	Clark	67	Son's appointment as attorney general	10 years
1969	Fortas	58	Pressures based on possible ethical violations	13 years
1969[a]	Warren	78[b]	Age	5 years
1971	Black	85	Age and ill health	1 month
1971	Harlan	72	Age and ill health	3 months
1975	Douglas	77	Age and ill health	4 years
1981	Stewart	66	Age	4 years

TABLE 2.4 ■ Reasons for Leaving the Court Since 1965 *(Continued)*

Year	Justice	Age	Primary reasons for leaving (aside from interest in affecting Court's ideological balance)	Length of time from leaving until death
1986	Burger	78	Uncertain: age, demands of service on a federal commission may have been factors	9 years
1987	Powell	79	Age and health concerns	11 years
1990	Brennan	84	Age and ill health	7 years
1991	Marshall	83[b]	Age and ill health	2 years
1993	White	76[b]	Desire to allow another person to serve, possibly age	9 years
1994	Blackmun	85	Age	5 years
2005	Rehnquist	80	Death	Same time
2006[a]	O'Connor	75	Spouse's ill health	NA
2009	Souter	69	Desire to return to New Hampshire	NA
2010	Stevens	90[b]	Age	9 years
2016	Scalia	79	Death	Same time
2018	Kennedy	82[b]	Desire to spend time with family, possibly age and health	NA
2020	Ginsburg	87	Death	Same time
2022	Breyer	83	Age	NA

Sources: Biographical sources, newspaper stories.

Note: NA = not applicable.

a. Warren originally announced the intent to leave the Court in 1968, O'Connor in 2005.

b. When they announced their intent to leave the Court, Warren was seventy-seven, Marshall eighty-two, White seventy-five, Stevens eighty-nine, and Kennedy eighty-one.

bowing to intense pressure from President Lyndon Johnson. In contrast, Byron White rejected the idea of becoming FBI director when the Reagan administration sounded him out about it.

With the possibility of other positions largely irrelevant, justices face the choice between continued Court service and retirement. Financial considerations once played an important part in those choices: several justices stayed on the Court, sometimes with serious infirmities, in order to keep receiving their salaries. Congress established a judicial pension in 1869, providing that federal judges with ten years of service could retire after turning seventy and continue to get their salaries.

In 1932, during the Depression, salaries for retired judges were cut in half, and none of the Court's several elderly justices retired until after Congress restored the full salaries for retirees in 1937.[57] (For one of those justices, James McReynolds, another consideration may have been involved. McReynolds had frosty relations with his colleagues, and a Court staff member wrote that the reason for his non-retirement was "just cussed meanness. He knows everyone would be jubilant and he won't give them that much happiness."[58])

Since that time, the pension has become even more generous. Justices who have served as federal judges for at least ten years and who are at least sixty-five years old can retire and continue to receive the salary they had at the time of retirement if their age and years of service add up to eighty or more. Justices can also receive any salary increases granted to sitting justices if they are disabled or if they perform a certain amount of service for the federal courts, generally equal to one-quarter of full-time work.

Thereby freed from financial concerns, older justices weigh the satisfactions of remaining on the Court against the prospective enjoyments of retirement and concern about their capacity to handle their work. In the current era, the satisfactions of continued Court service seem to be quite substantial: since 1970, all the justices except Potter Stewart and David Souter have stayed on the Court past the age of seventy, and nine have served in their eighties.

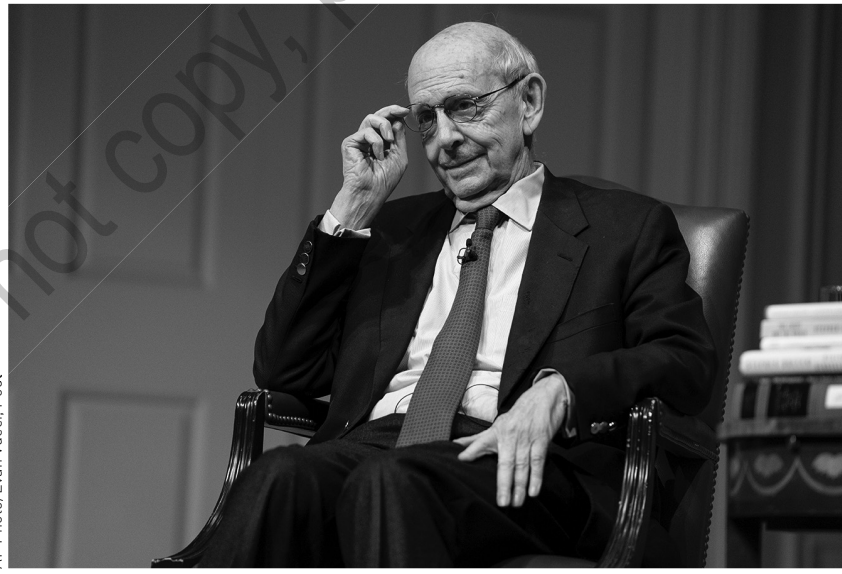
Even with the promise of generous pensions, some justices have remained on the Court after their health weakened considerably. During his last term on the Court in 1974 and 1975, William O. Douglas's mental condition had deteriorated so much that his colleagues issued no decisions in cases in which his vote would have been decisive.[59] William Rehnquist continued his service as chief justice in 2005 even when he was unable to participate fully in the Court's work because of cancer; he died later that year.

Most justices do leave the Court if their infirmities become clear, and some take precautions to avoid staying on the Court too long. Sandra Day O'Connor asked a former law clerk to monitor her work and let her know if she was no longer doing her job effectively.[60] John Paul Stevens asked his colleague David Souter to serve the same

function for him. In early 2010, after Souter had retired, Stevens was troubled when he found himself stumbling over words for the first time while presenting his opinion in a case. That experience moved him toward retirement, which he announced three months later.[61]

Some justices retire in the absence of health problems. Souter wanted to return to New Hampshire, and Sandra Day O'Connor needed to care for her ailing husband. Anthony Kennedy wanted to spend more time with his family. Age appeared to play a substantial role in the retirements of Kennedy and of Stephen Breyer.

Table 2.4 does not refer to justices' interest in the Court's ideological balance, but this clearly is a consideration for many justices. In the period since 1971, no justice has retired from the Court at a time when the justice and the sitting president were ideologically incompatible, except for three justices who had serious health problems.[62] Justices seldom cite this consideration publicly, but Stephen Breyer did so in 2021, a year before his retirement. In an interview, he quoted Justice Antonin Scalia: "He said, 'I don't want somebody appointed who will just reverse everything I've done for the last 25 years.' That will inevitably be" a factor in Breyer's own decision whether to retire.[63] A few months after he retired, Breyer mentioned a more specific political consideration: if Republicans won a Senate majority in the 2022 elections, they might refuse to confirm a Biden nominee to succeed Breyer. In turn, Breyer would have to delay his retirement for at least two more years and perhaps much longer if he wanted a Democratic president to name his successor.[64]



AP Photo/Evan Vucci, Pool

Justice Stephen Breyer speaks at the Library of Congress in February 2022, three weeks after he announced that he would retire at the end of the Court's term.

Just as some presidents have tried to create vacancies on the Court by inducing justices to take other positions, some have sought to secure the retirements of older justices. The results have been mixed. At a 2013 lunch in the White House, Obama told Ruth Bader Ginsburg of his concern that Republicans would win a Senate majority in the 2014 elections. Obama's implicit message that it would be good for Ginsburg to retire while he could appoint a liberal to succeed her failed to achieve its goal.[65] The Senate did turn Republican in 2014, as the presidency did in 2016, and Ginsburg remained on the Court even as her health problems worsened. Her death in September 2020 allowed President Trump to appoint Amy Coney Barrett to her seat. When the Court fully overturned *Roe v. Wade* in 2022, with Barrett providing one of the five votes for that outcome, even some of Ginsburg's admirers lamented her decision not to retire in 2013 or 2014.

The Trump administration engaged in a concerted campaign to induce the conservative Anthony Kennedy to retire. During the 2016 campaign, lawyers working with Trump consulted Kennedy when they were creating a list of potential Court nominees, and Kennedy suggested several of his former law clerks. In 2017, President Trump filled Antonin Scalia's seat on the Court with Neil Gorsuch, who had clerked for Kennedy in the Supreme Court. Trump later nominated three other former Kennedy clerks to federal courts of appeals. Trump spoke warmly of Kennedy. After Trump gave his first speech to Congress, he talked with Kennedy and praised his son Justin, who was acquainted with Donald Trump Jr. The administration got what it wanted when Kennedy announced his retirement in June 2018, though it is uncertain how much its efforts affected Kennedy's decision. In any event, it is very likely that Kennedy wanted to have a Republican president choose his successor.

After Amy Coney Barrett's 2020 appointment created a strong conservative majority on the Court and Joe Biden won the presidency shortly afterward, some liberals sought to pressure Stephen Breyer to retire in order to avoid any further movement of the Court to the right. Among other actions, interest groups and academics joined in an advertisement in the *New York Times* urging Breyer to retire, some members of Congress said that he should retire, and a truck circled the Court's grounds with a simple message on its billboard: "Breyer, retire."[66] But President Biden and his advisors carefully avoided doing anything to add their own pressure, in part because they feared that any efforts on their part would be counterproductive.[67]

Breyer remained on the Court throughout 2021. But he announced his impending retirement in January 2022. That gave the Biden administration ample time to secure confirmation for his successor by the end of the Court's term in June, when Breyer intended to retire. In case difficulties arose in securing a confirmation, Breyer made his retirement contingent on appointment of a successor. Thus Biden got what he wanted.

Under the Constitution, justices can be removed through impeachment proceedings for "treason, bribery, or other high crimes and misdemeanors."[68] President Thomas Jefferson actually sought to gain control of the largely Federalist (and anti-Jefferson) judiciary through the use of impeachment, and Congress did impeach and

convict a federal district judge in 1803. Justice Samuel Chase made himself vulnerable to impeachment by participating in President John Adams's campaign for reelection in 1800 and by making some injudicious and partisan remarks to a Maryland grand jury in 1803. Chase was indeed impeached, but the Senate acquitted him in 1805. His acquittal effectively ended Jefferson's plans to seek the impeachment of other justices.

No justice has been impeached since then, but the possible impeachment of two justices was the subject of serious discussion. Several efforts were made to remove William Douglas, most seriously in 1969 and 1970. The reasons stated publicly by advocates of impeachment were Douglas's financial connections with a foundation and his outside writings.[69] A special House committee failed to approve a resolution to impeach Douglas, and the resolution died in 1970.

Had Abe Fortas not resigned from the Court in 1969, he actually might have been removed by Congress.[70] Fortas had been criticized for his financial dealings at the time of his unsuccessful nomination to be chief justice in 1968. A year later, it was disclosed that he had a lifetime contract as a consultant to a foundation and had received money from the foundation at a time when the person who directed it was being prosecuted by the federal government. Under considerable pressure, Fortas resigned. It is not at all clear whether an impeachment effort would have been successful. But almost certainly, it would have been serious.

The campaigns against Douglas and Fortas came primarily from the Nixon administration, which sought to replace the two strong liberals with more conservative justices. John Dean, a lawyer on Nixon's staff, later reported that Fortas's resignation led to "a small celebration in the attorney general's office," which "was capped with a call from the president, congratulating" Justice Department officials "on a job well done."[71] In contrast, according to Dean, the unsuccessful campaign against Douglas "created an intractable resolve by Douglas never to resign while Nixon was president."[72]

The Fortas episode seems unlikely to be repeated, in part because it reminded justices of the need to avoid questionable financial conduct. The occasional removal of federal judges through impeachment proceedings makes it clear that impeachment is a real option. But it is used only in cases with strong evidence of serious misdeeds, often involving allegations of corrupt behavior.

In practice, then, the timing of a justice's leaving the Court reflects primarily the justice's own inclinations, health, and longevity. Those who want to influence the Court's membership may have their say once a vacancy occurs, but they have little control over the creation of vacancies.

The four most recent retirees all threw themselves into other activities. David Souter has served frequently in the federal court of appeals in Boston, near his New Hampshire home. In the nine years between his 2010 retirement and his death, John Paul Stevens wrote three books and some lengthy book reviews, and he gave a number of speeches and interviews. Before her health declined, Sandra Day O'Connor sat on cases with all eleven regional courts of appeals and spoke on behalf of causes such as replacement of state judicial elections with appointment systems. Stephen Breyer

returned to a faculty position in the Harvard Law School shortly after his retirement. These examples underline the fact that many justices leave the Court while they still have the capacity to play active roles.

CONCLUSION

The recruitment of Supreme Court justices is a complex process. People do not rise to the Court in an orderly fashion. Rather, whether they become credible candidates for the Court and whether they actually win appointments depend on a wide range of circumstances. Indeed, something close to pure luck plays a powerful role in determining who becomes a justice.

The criteria that presidents use in choosing nominees and the balance of power between president and Senate have varied over the Court's history. The attributes of the people selected as justices have also varied. Justices today are relatively diverse in race, gender, and social class backgrounds, but they are also relatively narrow in their educational and career backgrounds.

In the current era of high political polarization, presidents give close attention to the policy preferences of prospective nominees to the Court, senators scrutinize nominees closely, and interest groups work hard to influence the selection of justices. That is not surprising. All these participants recognize the Court's power and prestige, and they also perceive a strong link between the Court's membership and its decisions.

The same considerations may help to explain the reluctance of most justices to leave the Court, even at an advanced age. In any event, that reluctance has meant that vacancies on the Court sometimes occur only after long intervals. But whatever the timing of vacancies may be, the importance of seats on the Court has made the selection of justices a subject of intense interest in the political world and the country as a whole.

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