

THE JUSTICES

In recent years, the selection of Supreme Court justices has been a highly visible battleground. After Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Obama's nomination of Merrick Garland for Scalia's seat, saying the seat should be saved for the new president in 2017. In the next two years, President Trump's nominations of Neil Gorsuch and Brett Kavanaugh to the Court led to bitter conflicts between the two parties, and both nominees were confirmed by votes that followed party lines almost perfectly. After Justice Ruth Bader Ginsburg died in September 2020, President Trump and Senate Republicans moved quickly to fill her seat over heated complaints from Democrats. And there were no signs that this partisan strife would abate.

These battles reflect the importance of the Court's membership: what the Court does is determined to a considerable degree by who the justices are, so people who care about the Court's decisions also care about the selection of justices. The battles also reflect two key developments over the past several decades. One is a growing recognition of the Court's substantial role in shaping public policy, which has brought increased attention to the selection of justices. The other is the high level of polarization that has developed in the world of government and politics, especially in the form of increased hostility between Republicans and Democrats.

The first and longest section of this chapter examines the process by which 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 process by which vacancies are created in the first place. 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-2020, presidents had made 163 nominations to the Supreme Court, and 114 people had 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-six nominations to the Court and the twenty-eight justices chosen between 1953 and 2019.

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.

Table 2-1 Nominations to the Supreme Court since 1953

Name	Nominating president	Justice replaced	Years served
Earl Warren (CJ)	Eisenhower	Vinson	1953–1969
John Harlan	Eisenhower	Jackson	1955–1971
William Brennan	Eisenhower	Minton	1956–1990
Charles Whittaker	Eisenhower	Reed	1957–1962
Potter Stewart	Eisenhower	Burton	1958–1981
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

Name	Nominating president	Justice replaced	Years served
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–
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–
Merrick Garland	Obama	(Scalia)	Not considered, 2016
Neil Gorsuch	Trump	Scalia	2017–
Brett Kavanaugh	Trump	Kennedy	2018–

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.

Unofficial Participants

Because Supreme Court appointments are so important, many people seek to influence those appointments. When a vacancy occurs, and even before then, presidents and other administration officials may hear from a wide array of individuals and groups. So do senators who are deciding whether to vote to confirm a 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, so they would (and do) accept nominations readily. Indeed, people who hope for appointments to the Court sometimes make considerable effort to maximize their chances of success. William Howard Taft became chief justice in 1921 after years of efforts to position himself for that appointment. As an ex-president he had a great deal of influence, and one commentator described Taft as “virtually appointing himself” chief justice.¹

One longtime acquaintance of Brett Kavanaugh said, perhaps in jest, that “he’s been running for the Supreme Court since he’s been 25 years old.”² Some of Kavanaugh’s activities off the bench may have reflected his interest in achieving a nomination to the Court. When he was a leading candidate for a nomination in 2018, his 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.”³

There is circumstantial evidence that some judges on the federal courts of appeals campaign in a different way, taking positions in cases that they hope will enhance their chances of a Supreme Court nomination.⁴ In 2019 and 2020 some judges on the federal courts of appeals wrote long concurring or dissenting opinions that were likely to appeal to President Trump and to those advising him on nominations to the Court. In doing so they may have been “auditioning,” as some other judges have described such opinions.⁵

Nominees participate actively in the confirmation process. They typically meet with most senators before their confirmation hearings. Occasionally, what nominees say in those meetings has an impact. After conferring with his advisors, Neil Gorsuch replied to a Democratic senator’s question by saying that he was unhappy about President Trump’s criticisms of federal judges. After the senator reported Gorsuch’s response, some administration officials feared that the president would want to withdraw the Gorsuch nomination, and by some accounts he did consider that step.⁶

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 Gorsuch prepare, 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. 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. But today, in an era of



AP Photo/Jacquelyn Martin

► **Photo 2-1** Judge Brett Kavanaugh testifying at the special confirmation hearing before the Senate Judiciary Committee on charges of sexual misconduct against him in 2018. Supreme Court nominees' testimony has become a key stage in the selection process for justices.

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.

Just as Brett Kavanaugh played an active role in the campaign to win President Trump's nomination in 2018, he played an unusually active role late in the confirmation process. After charges of sexual misconduct were raised against Kavanaugh, he worked to refute those charges. He gave an interview to Fox News before testifying at the special Judiciary Committee hearing on the charges. His combative testimony at that hearing helped to solidify support for him from Republican senators. It also raised questions about his "judicial temperament" for some people, and he responded with an op-ed in the *Wall Street Journal* in which he apologized for some of the things he had said.¹⁰

The Legal Community

Lawyers have a particular interest in the Supreme Court's membership, and their views about potential justices may carry special weight. As the largest and most prominent organization of lawyers, the American Bar Association (ABA) occupies an important position. An ABA committee investigates presidential nominees for federal judgeships, including the Supreme Court, and rates them as "well-qualified," "qualified," or "not qualified."

Ideally, from the ABA's perspective, it would make ratings of prospective nominees before they are selected, so the president's administration could take those ratings into account. But Republican presidents have become unwilling to give that role to the ABA committee, based on a perception that the committee is biased against conservative nominees. Even so, the ABA's unanimous ratings of nominees as "well-qualified," which every nominee since 1993 has received (Harriet Miers in 2005 withdrew before she was rated), strengthen their credentials. By the same token, if a nominee does not get such strong approval, that negative sign might affect the judgments of some senators.

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 then-candidate Donald Trump 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 and the revised lists that were issued later in 2016 and in 2017 and 2020. Trump said in June 2016 that "we're going to have great judges, conservative, all picked by the Federalist Society."¹¹ Leonard Leo, executive vice president of the Society, helped to coordinate the processes that culminated in the nominations of Neil Gorsuch and Brett Kavanaugh.

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, was active in suggesting names to fill other

vacancies during the Nixon administration. He played a crucial role in the 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 as a prospective justice helped to bring about President Trump's selection of Kavanaugh as Kennedy's successor.¹³

Other Interest Groups

Many interest groups have a stake in Supreme Court decisions, so groups often 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 typically are politically important to the president. Democratic presidents usually give some weight to the views of labor and civil rights groups. Republican presidents usually 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 often 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 interest group activity, 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 opposition to controversial nominees 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 President 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.

Conservative groups were quite active in the battles over confirmation of Merrick Garland, Neil Gorsuch, and Brett Kavanaugh. The conservative Judicial Crisis Network spent at least \$7 million in opposition to Garland, \$10 million in support of Gorsuch, and \$12 million on behalf of Kavanaugh.¹⁵ These campaigns centered on advertising in states with potentially wavering senators, especially Democrats from strongly Republican states. For their part, liberal groups pushed Democratic senators to oppose Gorsuch and Kavanaugh vigorously. Their advertising campaigns against the two nominees were substantial but less extensive than the campaigns for the nominees.

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. 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. Bill Clinton, George W. Bush, and Barack Obama played a more active role in the process than did their predecessors Ronald Reagan and George H. W. Bush. Obama, a former constitutional law professor with a strong interest in the Court, was especially active. Still, all 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 preparatory work before a vacancy in the Court actually arises. 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. President Obama, for instance, chose Elena Kagan from a group of finalists that also included three judges on the federal courts of appeals.¹⁹ 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 often introduce an element of chaos to the process. That was true of the George W. Bush nominations and, even more, those made by President Clinton.

President Trump’s nominations of Neil Gorsuch and Brett Kavanaugh 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. In other respects, the process that culminated in those nominations was fairly typical for the current era. 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 the actual nominees. Even before Trump took office, according to one report, McGahn had a clear vision of what was going to happen: Gorsuch would be nominated to fill the existing vacancy on the Court, the administration would encourage Anthony Kennedy to retire, and Kavanaugh would be nominated to fill his seat.²⁰

Although that vision was fulfilled, President Trump and his advisors considered and interviewed several candidates from the list of prospective nominees for each vacancy. Gorsuch was one of three judges on the federal courts of appeals whom Trump interviewed in 2017. A fourth court of appeals judge reportedly was not interviewed because one advisor “thought him too impressive and was worried that Trump might favor him over Gorsuch, upending the underlying strategy.”²¹ When those interviews were completed, McGahn strongly recommended Gorsuch and Trump chose him.²²

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.²³

Amy Coney Barrett was widely expected to win a nomination for Justice Ginsburg’s seat if Ginsburg left the Court while Trump was president. Indeed, she was nominated with extraordinary speed. Two White House staff members contacted her the day after Ginsburg’s death. After she had a series of meetings with members of the administration, two days later President Trump offered her the nomination and she accepted it, though the nomination was not announced until later that week.

The possible criteria for nominations 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 candidate’s competence or ethical behavior work against Senate confirmation.

Because presidents care about competence, only in a few cases has a nominee’s capacity to serve on the Court been seriously questioned. One of those was Nixon’s

nominee G. Harrold Carswell, who was denied confirmation. 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 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 in 1991 and Brett Kavanaugh in 2018 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.”²⁴ 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. These criteria have always been a consideration in the selection of Supreme Court justices. In the current era, every president pays considerable attention to the policy preferences of prospective nominees. This emphasis reflects the Court’s increased prominence as a policy maker and the fact that interest groups associated with both parties care so much about the Court’s direction. But presidents of the two parties have taken somewhat different approaches.

Republican presidents give special 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 of their tenure. The same was true of two justices appointed by Republican President Eisenhower in the 1950s, Earl Warren and William Brennan.

In response to these disappointments, party activists have pushed Republican administrations to give strong 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 and in the key roles that conservative groups played in the selection of potential Donald Trump nominees and Trump's choices of Gorsuch, Brett Kavanaugh, and Amy Coney Barrett from those candidates.

For recent Democratic presidents, it was important that their nominees be liberals, but not that they be strong liberals. On the whole, the Clinton and Obama nominees were relatively moderate. Memoranda by people helping Clinton in 1993 described Stephen Breyer as moderate or even moderately conservative on some issues, but Clinton nonetheless nominated Breyer to the Court a year later.²⁵

Obama's 2016 nomination of the moderate liberal Merrick Garland was a special case, because Obama sought someone who might cause some senators in the Republican majority to break from their leadership's position that it would not consider any Obama nominee. The other four Clinton and Obama nominations came when Democrats held Senate majorities, yet none were perceived as highly liberal. 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.

Also relevant are differences between the parties in the current era. 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, Democratic presidents have felt relatively little pressure to choose strong liberals. But because of widespread unhappiness among liberals about the Senate's refusal to consider Garland and President Trump's appointments to the Court, future Democratic presidents will feel much greater pressure to make ideology the key criterion for nominations.

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 confident about the kinds of positions the judge would take on many issues as a justice.

Some nominees do not have these long records. Miers and Kagan had never served as judges. Sandra Day O'Connor had served only on state courts, and most kinds of issues that come to the Supreme Court are uncommon in state courts. John Roberts, Clarence Thomas, and David Souter had only short service on federal courts of appeals—for Souter, so short that he had written no opinions. For candidates such as these, other sources of information can be consulted.

Most justices do reflect the ideological leaning of the president's party at least fairly well. But the Republican appointees from the 1950s to 1990 who developed moderate or liberal records on the Court are a reminder that this is not always the case. These exceptions generally fall into two categories. First, some justices were chosen by presidents who did not have a strong interest in choosing ideologically compatible justices or who were not careful about doing so. For instance, policy considerations were not dominant in Gerald Ford's choice of John Paul Stevens or

in Ronald Reagan's choice of Sandra Day O'Connor. President Eisenhower and his aides did not scrutinize Earl Warren and William Brennan as closely as they might have, and those two justices helped to establish a highly liberal Court majority in the 1960s.

Second, some justices shift their ideological positions after reaching the Court. Richard Nixon's one "failure" was Harry Blackmun, who had a distinctly conservative record in his early years on the Court but gradually adopted more liberal positions. Anthony Kennedy also may have shifted in a liberal direction after reaching the Court, although to a lesser degree. A conservative publication later referred to Kennedy as "surely Reagan's biggest disappointment."²⁷

To the extent that presidents seek nominees who reflect their party's dominant ideological orientation, the increased "sorting" of conservatives into the Republican Party and liberals into the Democratic Party in the last few decades has made presidents' jobs easier. Because of sorting, fewer people with the credentials needed for a Supreme Court appointment deviate from their party's dominant orientation. The enhanced role of ideology in the selection of court of appeals judges in the past few decades has reinforced that development. A Republican president, for instance, can choose from a substantial pool of judges with strongly conservative backgrounds and judicial records. Because of those changes and the increasing care with which nominations are made, the overall records of justices on the Court are now unlikely to disappoint the presidents who chose them.

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.²⁸ 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 reportedly 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.²⁹

Some appointments to the Court were direct 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.

This pattern has changed fundamentally. Of the twenty-six nominees from Warren Burger in 1969 to Amy Coney Barrett in 2020, 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 Kavanaugh, Trump told an audience that “I don’t even know him. I met him for the first time a few weeks ago.”³⁰

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 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 of partisan sorting. 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. (Neil Gorsuch, appointed in 2017, was raised Catholic but attended an Episcopal church in Colorado before he joined the Supreme Court. Brett Kavanaugh, like his predecessor Anthony Kennedy, is Catholic.)

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 African American justice (Thurgood Marshall), and Barack Obama chose the first Hispanic justice (Sonia Sotomayor). Three of the five Clinton and Obama nominees (Ruth Bader Ginsburg, Sotomayor, and Elena Kagan) were women.

To a lesser degree, these considerations affect Republican nominations as well. George H. W. Bush's nomination of Clarence Thomas to succeed Thurgood Marshall 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. When George W. Bush nominated Harriet Miers, all the finalists were female. But Bush's choice of Samuel Alito after Miers withdrew reflected the dominance of ideology as a criterion for Republican presidents, though gender may have been one consideration in Trump's selection of Amy Coney Barrett 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.

Although a simple majority is needed for confirmation, 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 the rules to require only a simple majority to end debate on a Supreme Court nomination, and it then voted to end debate on Gorsuch by a 55–45 vote. The votes on ending debate were 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 2019, 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.³¹ 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 even those nominees whose ideological positions seemed quite distant from their own positions.³² 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 shows, as late as the period from 1954 to 1965, 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 1953

Nominee	Year	Vote
Earl Warren	1954	NRV
John Harlan	1955	71–11
William Brennan	1956	NRV
Charles Whittaker	1957	NRV
Potter Stewart	1959	70–17
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

(Continued)

Table 2-2 (Continued)

Nominee	Year	Vote
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
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

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 Brett Kavanaugh in 2018, there were eight nominations, including the withdrawn nomination of Harriet Miers later in 2005. Of the other seven, only Merrick Garland in 2016 failed to win confirmation. But the others received substantial numbers of negative votes, and none received majority support from senators in the party that did not hold the presidency. This opposition, along with unanimous or near-unanimous support for nominees from senators in the president's party, marks a new era of unusually sharp partisan conflict over confirmation.

Although the 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

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. Nominees certainly received more intense scrutiny in the Senate: 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 1965.³³

The votes in Table 2-2 highlight the wide variation in senators' responses to different nominations during the transitional era. The sources of those differences are suggested by two pairs of adjacent nominees.

The first pair was Antonin Scalia and Robert Bork, nominated by Republican president Reagan in 1986 and 1987. Scalia and Bork had both been well-regarded legal scholars, and both were clearly conservative. But Scalia was confirmed unanimously, while Bork was defeated. Bork had the disadvantage of a large body of writing that included highly conservative and unpopular views on some legal issues, but more important were the differences in the situations that the two nominees faced.

One key difference was that the Senate had a Republican majority in 1986 but a Democratic majority the next year. Presidents have done far better in winning confirmation for their nominees when their party holds a Senate majority. Another was that Scalia replaced another strong conservative but Bork would have replaced a moderate conservative on a Court that was closely divided between liberals and conservatives.

Finally, in 1986, liberal senators and interest groups focused their efforts on defeating William Rehnquist's nomination for chief justice and largely ignored

Scalia. In 1987, in contrast, liberal interest groups mounted a major campaign against Bork. This was a crucial step, because such a campaign could overcome the assumption that the nominee would be confirmed. The charge of extremism from interest groups and some Democratic senators was strengthened by some of Bork's statements at his confirmation hearing, and the Reagan administration was not as effective as it could have been in defending Bork. Ultimately, all but two of the Senate's Democrats voted against Bork, and they were joined by six Republicans. As a result, he lost by a 42–58 margin.

The second pair was David Souter and Clarence Thomas, chosen by Republican president George H. W. Bush in 1990 and 1991. They were nominated in similar situations: there were Democratic majorities in the Senate, and each nominee would replace a highly liberal justice. But Souter won confirmation with only nine negative votes, while forty-eight senators voted against Thomas and his confirmation was achieved with some difficulty.

One source of the difference was that Thomas's past policy positions indicated he was a strong conservative, while Souter's more limited record suggested he was more moderate. The other source was a perception that Souter was well qualified for the Supreme Court, while Thomas's qualifications might be questioned. Both nominees received some opposition from liberal interest groups, but the opposition to Thomas was broader and more intense. Partly as a result, most Democratic senators lined up against Thomas. Opposition 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. For one thing, presidents tend to become politically weak by the end of their terms, especially a second term. Further, senators from the other party would like to reserve a vacancy in case their party wins the presidential election.³⁴ Indeed, in 1968 half the Republican senators signed a statement saying that they would vote against confirming any Johnson nominee in his last year.³⁵

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.

In 1969, Fortas resigned from the Court. President Nixon selected Clement Haynsworth, chief judge of a federal court of appeals, to replace him. Haynsworth was opposed by labor groups and the National Association for the Advancement of Colored People (NAACP), both of which disliked his judicial record. Liberal senators, unhappy about that record themselves, sought revenge for Fortas's defeat 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.”³⁶ But Carswell drew opposition from civil rights groups for what they perceived as his hostility to their interests, 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.”³⁷ 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, different though they were, 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 Current Era

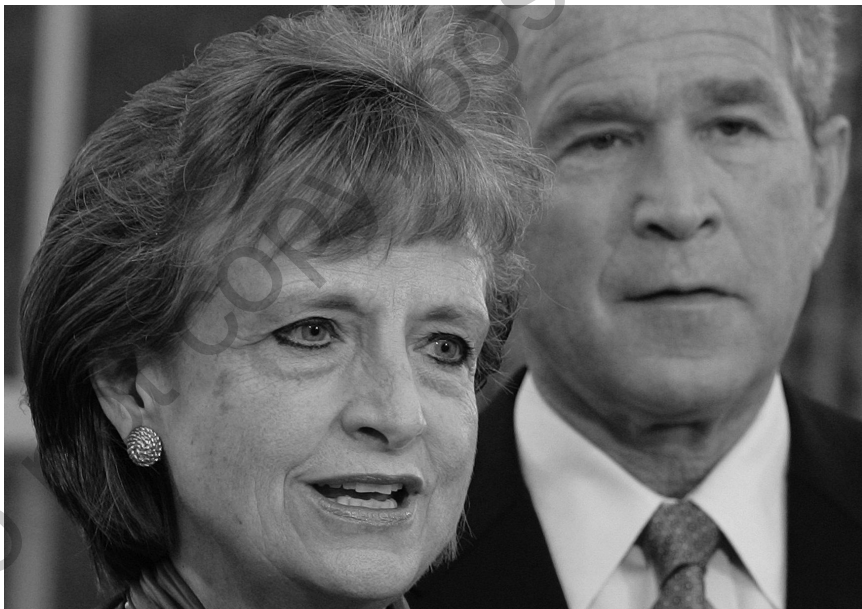
President Bill Clinton's nominations of Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994 were the last ones made in the transitional era. Several conditions favored easy confirmations for Ginsburg and Breyer: the Senate had a Democratic majority, the nominees were well-regarded judges, and neither 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—not enough to threaten his confirmation, but a noteworthy number.

What had changed? The best single answer is that the growing polarization in politics was having a powerful effect 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 support their own party's nominees and to oppose nominees from the other party. Also important was the continuing close balance between conservatives and liberals on the Court, combined with a perception that this balance had considerable effect on decisions that were important to the two parties.

When Harriet Miers withdrew a few weeks after Bush nominated her to succeed Sandra Day O'Connor later 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, but for the same



AP Photo/Ron Edmonds

► **Photo 2-2** Harriet Miers with President George W. Bush, who nominated her for the Supreme Court in 2005. Miers' withdrawal under pressure from Republican conservatives underlined the importance of Supreme Court appointments to ideological groups that are associated with the two parties.

reason it aroused considerable unhappiness among liberal Democrats. Alito seemed considerably more conservative than O'Connor, so his appointment might have a significant effect on the Court's ideological balance.

The campaign against Alito 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."³⁸ 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. Although those Republicans cited specific concerns about Sotomayor, their votes were primarily a product of ideological considerations: conservative senators and interest groups that were important to those senators saw the nominee as unduly liberal.

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. Even in the absence of a prior judicial record, 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. Some were willing to meet with Garland, but 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 was on one of Donald Trump's lists of prospective nominees in 2016. Like nearly everyone else on the lists, he was a sitting judge with a strong conservative record. 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.

In some respects, the situation facing Brett Kavanaugh was similar to that for Gorsuch: a small Republican majority and a focus on a few senators who might be persuaded to diverge from their party colleagues. But the battle was more intense 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 worked 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.

Thus, the confirmation process has changed a good deal in the current era. This change is reflected in Justice Ginsburg's statement in 2011 that her work with the American Civil Liberties Union (ACLU) "would probably disqualify me" in the current era and Chief Justice Roberts's judgment in 2014 that neither Ginsburg nor Antonin Scalia "would have a chance" of confirmation today.³⁹ By the same token, at least half of the successful nominees between 2005 and 2018—those whose appointments were unlikely to change the Court's ideological balance very

much—probably would have received only a few negative votes, if any, had they been nominated in the transitional era.

Political polarization has made senators' party affiliations the primary determinants of their votes.⁴⁰ In contrast with the votes on Abe Fortas, Clement Haynsworth, and G. Harrold Carswell in the transitional era, senators in the current era nearly always vote to confirm nominees from their own party even when confirmation is strongly contested. Across the five nominees from Samuel Alito to Brett Kavanaugh that the Senate considered, there were only two negative votes from members of the president's party, less than 1 percent of all their votes. In contrast, 89 percent of the votes from the other party were against confirmation. (Independents are counted as members of the party that they caucused with.) In both parties, activists help to rein in senators with the explicit or implicit threat that they will be opposed in primary elections if they stray from the party's position.⁴¹

As a result, party control of the Senate has become even more important than it was in past eras. None of the six successful nominees in the current era were in serious danger of defeat, because the president's party had a Senate majority in each instance. Even in the current era, Ginsburg and Scalia probably would have been confirmed so long as their party had a Senate majority. By the same token, Republican control of the Senate in 2016 allowed Merrick Garland to be denied consideration. Indeed, it is possible—as some Republican senators advocated—that if Hillary Clinton had been elected president in 2016, any nomination she made would have been blocked as long as Republicans maintained a Senate majority.

The history of Senate confirmation strongly suggests that the current era will end at some point. But for now, with sharp political polarization and bitter contention over ideological control of the Supreme Court, nominees will face a response from senators that falls overwhelmingly along partisan lines.

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.⁴² Thus, it is important to know what kinds of people reach the Court, and why.

Career Paths

One way to understand these questions is by tracing the paths that people take to get to the Court. These paths have changed over time. To highlight that change, in this section I examine the set of thirty-nine justices who have been appointed since 1937, when Franklin Roosevelt made his first appointment. Recent justices are of particular interest, and Box 2-1 summarizes the careers of the justices who sat on the Court in 2019–2020.⁴³

BOX 2-1

Careers of the Supreme Court Justices, 2019–2020

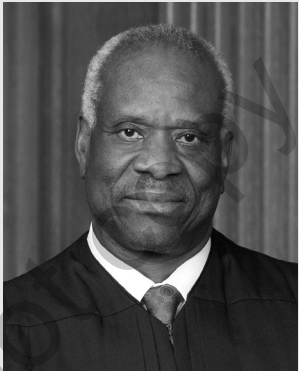
Steve Petteway, Collection of the Supreme Court of the United States



► **Photo 2-3**

John G. Roberts Jr. (born 1955)
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

Steve Petteway, Collection of the Supreme Court of the United States



► **Photo 2-4**

Clarence Thomas (born 1948)
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

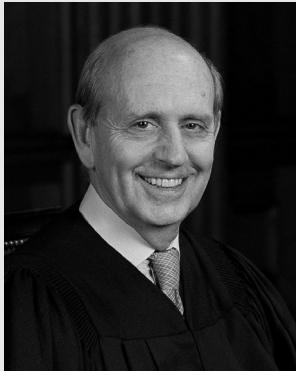
Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-5

Ruth Bader Ginsburg (born 1933)
Law degree, Columbia University, 1959
Law clerk, federal district court, 1959–1961
Law school research position, 1961–1963
Law school teaching, 1963–1980
Judge, U.S. Court of Appeals, 1980–1993
Appointed to Supreme Court, 1993

Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-6

Stephen G. Breyer (born 1938)
Law degree, Harvard University, 1964
Law clerk, Supreme Court, 1964–1965
U.S. Justice Department, 1965–1967
Law school teaching, 1967–1980
Staff, U.S. Senate Judiciary Committee, 1974–1975, 1979–1980
Judge, U.S. Court of Appeals, 1980–1994
Appointed to Supreme Court, 1994

Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-7

Samuel A. Alito Jr. (born 1950)
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

(Continued)

(Continued)

Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-8

Sonia Sotomayor (born 1954)

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

Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-9

Elena Kagan (born 1960)

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

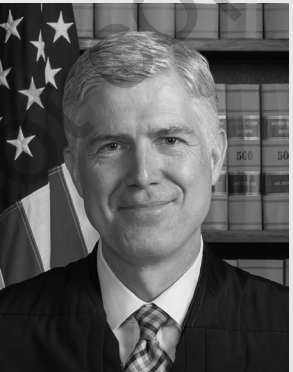
Positions in executive branch, 1995–1999

Law school teaching and
administration, 1999–2009

U.S. Solicitor General, 2009–2010

Appointed to Supreme Court, 2010

Steve Petteway, Collection of the Supreme Court of the United States



► Photo 2-10

Neil Gorsuch (born 1967)

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



► Photo 2-11

Brett Kavanaugh (born 1965)
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

Source: *Biographical Directory of Federal Judges*, Federal Judicial Center, <https://www.fjc.gov/history/judges>. All photos: Steve Petteway, Collection of the Supreme Court of the United States.

Note: With the exception of Justice Breyer's Senate staff service, 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 be attorneys. In practice, however, this restriction has been absolute. Nearly everyone involved in the selection process assumes that only a person with legal training can serve effectively on the Court. If a president nominated a non-lawyer to the Court, this assumption—and the large number of lawyers in the Senate—almost surely would prevent confirmation.

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 other lawyers in this period—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 Sandra Day O'Connor in 1981

through Brett Kavanaugh in 2018, all thirteen appointees to the Court went to the law schools at Harvard, Yale, or Stanford. (Ruth Bader Ginsburg received her law degree from Columbia after spending her first two years at 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 justices appointed since 1937 held positions of four types. They were judges, executive branch officials, elected officials, or well-respected leaders in the legal profession.

Twenty-one of the justices appointed in this period were appellate judges at the time of selection. Nineteen sat on the federal courts of appeals, the other two on state courts. Seven of the nineteen federal judges came from the District of Columbia circuit, which is especially visible to the president and other federal officials.

Eleven justices served in the federal executive branch at the time of their appointment, eight of them in the Justice Department. The other three justices were chair of the Securities and Exchange Commission (William Douglas), secretary of the Treasury (Fred Vinson), and secretary of labor (Arthur Goldberg).

Of the other seven justices appointed since 1937, four held high elective office. Three were senators (Hugo Black, James Byrnes, and Harold Burton), and the fourth was the governor of California (Earl Warren). The other three held positions outside government. Each had attained extraordinary success and respect—as a legal scholar (Felix Frankfurter), a Washington lawyer (Abe Fortas), and a leader of the legal profession (Lewis Powell). Frankfurter and Fortas had also been informal presidential advisors.

The Steps Between

The people who have become Supreme Court justices took several routes from their legal education to the high positions that made them credible candidates for the Court. Frankfurter, Fortas, and Powell illustrate one simple route: entry into legal practice or academia, followed by a gradual rise to high standing in the legal profession. Some justices took a similar route through public office. Earl Warren held a series of appointive and elective offices, culminating in his California governorship. Clarence Thomas, Samuel Alito, and Brett Kavanaugh each served in several non-elected government positions and then as a judge on a federal court of appeals.

Since 1975, 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,

and Stephen Breyer were law professors. Anthony Kennedy and John Roberts were in private practice. Before becoming judges, all five had 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.

Justice 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 Paths

Even within the period since 1937, there has been a striking change in justices' pre-Court careers. Put simply, those careers have come to involve less politics and more law. This change did not happen abruptly, but it is illustrated by a 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 as many had held elective office, and more than a quarter had headed a federal administrative agency.

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
1969–2019	6	6	83
	Position at appointment		
1937–1968	19	29	29
1969–2019	0	0	83

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.

The eighteen justices who arrived at the Court during the period from 1969 through 2019 were different. All but three came directly from lower courts. 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 government before winning judgeships. For the justices chosen in this era, the median proportion of their careers spent in what might be called the legal system—private practice, law school teaching, and the courts—was 85 percent. For the justices appointed between 1937 and 1968, the median had been 67 percent.⁴⁴ The high proportion for the period since 1969 is all the more striking because the Roberts Court's 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.⁴⁵

These changes in justices' career paths seem to have two sources. The first is that long experience in the legal system and service as a judge are increasingly viewed as indications that a nominee is well qualified to serve on the Supreme Court. Indeed, Harriet Miers in 2005 and Elena Kagan in 2010 were criticized for the absence of judicial experience.

Second, and especially 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, some people have argued that the limited experience of recent justices in politics has made it more difficult for them to understand cases relating to politics. In 2016 the Court unanimously interpreted a federal bribery statute in a way that made it more difficult to secure convictions of public officials. One commentator—a former lobbyist who had been convicted and imprisoned for offenses related to political corruption—argued that the justices had misperceived the realities of politics “because none of them have been in the political process.”⁴⁶

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 1937, most Supreme Court justices have been in their fifties at the time of their appointments and the rest in their forties or early sixties. William Douglas was the youngest appointee, at age forty; 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. Thus, a candidate such as Clarence Thomas, forty-three when George H. W. Bush appointed him, can be especially attractive. Relative youth was an important criterion in the selection processes that resulted in President Trump's nominations of Neil Gorsuch (forty-nine when nominated), Brett Kavanaugh (fifty-three), and Amy Coney Barrett (forty-eight).

Class, Race, and Sex

The Supreme Court's membership has diverged from the general population in regard to social class: most justices grew up in families that were relatively well off during their childhoods. One study found that about one-third of the justices were from high-income families and one-quarter from upper middle-income families. Less than one-quarter were from lower middle-income or low-income families. But the justices selected from the 1930s on have been less of a high-status group than their predecessors, with a far smaller proportion coming from wealthy families and about half from families at or below the middle-income category.⁴⁷

The historic predominance of higher-status backgrounds can be explained by the career paths that most justices take. First, a justice must obtain a legal education. To do so 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. Similarly, those who can afford to attend elite law schools have the easiest time obtaining Supreme Court clerkships and positions in successful law firms. The increased availability of college and legal education to people of limited means helps to explain the changes in justices' collective economic backgrounds since the 1930s.

Until 1967, all the justices were white men. This pattern is not difficult to understand. Because of various restrictions, women and members of racial minority groups long had enormous difficulty pursuing a legal education. As a result, few members of these groups passed the first criterion for selection. In addition, discrimination 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.

Since 1967, four women (Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan), two African Americans (Thurgood Marshall and Clarence Thomas), and a Hispanic American (Sotomayor) have won appointments to the Court. These appointments reflect changes in society that made it less difficult for people other than white men to achieve high positions. They also reflect the growing willingness of presidents to consider women and members of racial minority groups as prospective nominees.

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 its 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 affects the Court's collective judgments in some cases.⁴⁸

On the other hand, justices with similar backgrounds or life experiences may develop very different points of view. As Justice 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."⁴⁹ And justices' social class origins might affect their views less than does the high professional status that they all achieved by the time they joined the Court. This may help to explain why the justices with relatively humble backgrounds have included conservatives such as Thomas and Warren Burger as well as liberals such as Sotomayor and Earl Warren.

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. Still, the Court is homogeneous in the sense that from the time of their college education, all the justices became part of an elite group. All nine of the 2019–2020 justices graduated from private undergraduate schools, including seven who went to Ivy League schools. And all nine justices went to law school at Harvard or Yale. Some commentators have expressed concern about what they see as the insularity of a Court that comes from such a narrow range of schools. As Justice Kagan said, referring to Ruth Bader Ginsburg's law school transfer, "Know what our diversity is? Justice Ginsburg spent a year at Columbia."⁵⁰

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. Seven of the 2019–2020 justices served in presidential administrations. Clarence Thomas worked with John Danforth when Danforth was the Missouri attorney general and a U.S. senator. Stephen Breyer interrupted his service as a law professor twice to work with Democrats on the Senate Judiciary Committee. 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.

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.

In that 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, 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.

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.”⁵¹

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. Some prominent Democrats have talked about that possibility as a means to counterbalance President Trump’s appointments, but the enactment of such legislation seems unlikely. 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 become quite uncommon 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

Table 2-4 Reasons for Leaving the Court since 1965

Year	Justice	Age	Primary reasons for leaving	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
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

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.

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, bowing to intense pressure from a president (Lyndon Johnson) who wanted to create a vacancy on the Court that he could fill. 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, to keep receiving their salaries. Congress established a judicial pension in 1869, and it is now quite 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 received 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 against 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.⁵² 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. Antonin Scalia had serious medical problems before his death in 2016, but it does not appear that those problems had much effect on his work as a justice.

Most justices do leave the Court when their infirmities become clear. 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.⁵³ 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.⁵⁴

Souter and Sandra Day O'Connor retired in the absence of health problems—Souter because of his preference for living in New Hampshire and O'Connor because of her need to care for her ailing husband. O'Connor's retirement came under unusual circumstances. With Chief Justice Rehnquist's own health deteriorating in 2004 and 2005, O'Connor talked with him about the timing of their retirements in light of their shared view that they should not create two Court vacancies

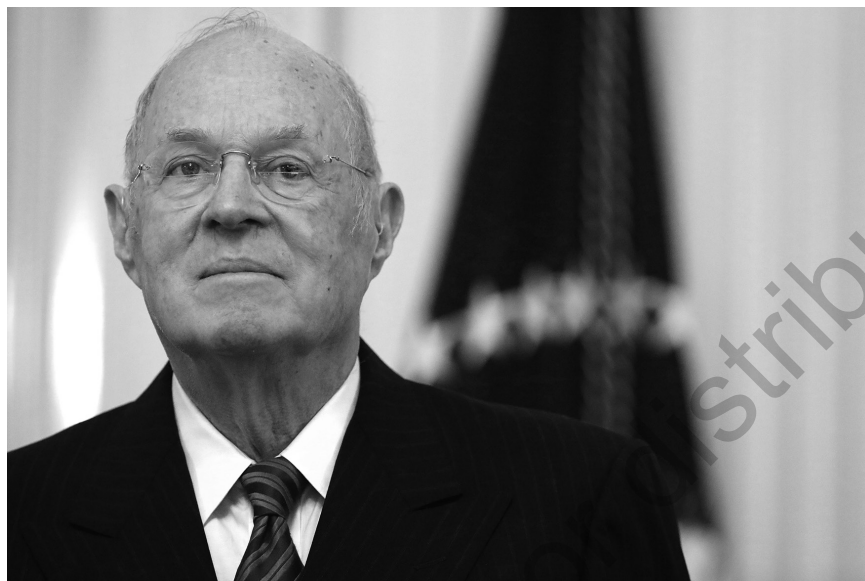
in the same year. When Rehnquist made it clear that he would not retire in 2005, O'Connor concluded that she should retire herself rather than wait two years to retire in case Rehnquist left the Court in 2006. As it turned out, Rehnquist died in 2005 after O'Connor announced her retirement. The health of O'Connor's husband then declined so much that she could no longer care for him, which meant that she would have had no reason to leave the Court. O'Connor's seat was filled with the more conservative Samuel Alito, so her deference to Rehnquist made considerable difference for the Court. According to one account, O'Connor later wondered whether Rehnquist had maneuvered to get her to retire.⁵⁵

Justices are well aware that the Court's future direction depends in part on which president gets to appoint their successor. The half dozen justices who retired most recently did so at a time when the president was ideologically compatible with them, and this pattern is not entirely accidental. For instance, a friend of David Souter's reported that Souter told him in 2008, "If Obama wins, I'll be the first one to retire."⁵⁶ Souter did announce his retirement three months after Obama took office. But health problems and other circumstances sometimes prevent justices from timing their retirements in this way.⁵⁷

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. John Kennedy reportedly persuaded Felix Frankfurter to retire after ill health had decreased his effectiveness, but some other justices resisted similar efforts by Richard Nixon and Jimmy Carter.

When Donald Trump became president in 2017, three justices were at least seventy-eight years old. Democrats Stephen Breyer (seventy-eight at the time) and Ruth Bader Ginsburg (eighty-three) were quite unlikely to retire under a Republican president so long as they were in good health. Ginsburg had faced calls from liberals to retire while Barack Obama was president, but she chose to stay on the Court. With Trump in office, she continued to insist that she would not retire despite several serious health problems that she had overcome. She noted in 2019 that when she contracted cancer in 2009, a Republican senator "announced with great glee that I was going to be dead within six months. That senator . . . is now himself dead."⁵⁸ She remained on the Court until her death in 2020.

Anthony Kennedy, eighty years old when President Trump took office, was a fairly conservative Republican. 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. President Trump filled the Scalia seat 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 he wanted to have a Republican president choose his successor.



Chip Somodevilla/Getty Images

► **Photo 2-12** Justice Anthony Kennedy at the 2018 ceremony in which his successor Brett Kavanaugh was sworn in. Like most other justices in the current era, Kennedy retired from the Court when a president who shared his ideological leaning was in office.

Under the Constitution, justices can be removed through impeachment proceedings for “treason, bribery, or other high crimes and misdemeanors.”⁵⁹ 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 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.⁶⁰ 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.⁶¹ 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. The resignation came too quickly to determine 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."⁶² In contrast, according to Dean, the unsuccessful campaign against Douglas "created an intractable resolve by Douglas never to resign while Nixon was president."⁶³

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 when a vacancy occurs, but they have little control over the creation of vacancies.

Justices who enjoy good health after their retirement often remain active, and that is true of the three most recent retirees. David Souter has served frequently in the federal court of appeals in Boston, near his New Hampshire home. In the decade after his 2009 retirement, he participated in about 400 decisions.⁶⁴ 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 combined judicial and non-judicial activity. She participated in cases for eight years after her 2006 retirement, sitting with all eleven regional courts of appeals. She also spoke on behalf of causes such as replacement of state judicial elections with appointment systems. In 2009 she founded an organization that develops and distributes video games to teach students about the political system and to encourage political participation.⁶⁵ Her example—like those of Stevens and Souter—underlines 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 choose nominees with close attention to their policy preferences, 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.

NOTES

1. Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed. (Lanham, Md.: Rowman & Littlefield, 2008), 146.
2. "Judging Brett Kavanaugh and the Supreme Court with John Yoo," *Uncommon Knowledge with Peter Robinson*, Hoover Institution, September 5, 2018, quoted in Ruth Marcus, *Supreme Ambition: Brett Kavanaugh and the Conservative Takeover* (New York: Simon & Schuster, 2019), 152.
3. Mollie Hemingway and Carrie Severino, *Justice on Trial: The Kavanaugh Confirmation and the Future of the Supreme Court* (Washington, D.C.: Regnery, 2019), 14–16. The quotations are from p. 16.
4. Jeffrey Budziak, "Blind Justice or Blind Ambition? The Influence of Promotion on Decision Making in the U.S. Courts of Appeals," *Justice System Journal* 34 (2013): 295–320; Ryan C. Black and Ryan J. Owens, "Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court," *American Journal of Political Science* 60 (January 2016): 30–43.
5. These cases include *Jackson Women's Health Organization v. Dobbs* (5th Cir. 2019), *Kanter v. Barr* (7th Cir. 2019), *Trump v. Mazars USA, LLP* (D.C. Cir. 2019), and *United States v. Brown* (11th Cir. 2020). The term "auditioning" is discussed in Marcus, *Supreme Ambition*, 152.
6. Carl Hulse, *Confirmation Bias: Inside Washington's War Over the Supreme Court, from Scalia's Death to Judge Kavanaugh* (New York: HarperCollins, 2019), 168–169; Marcus, *Supreme Ambition*, 65–66.
7. Hulse, *Confirmation Bias*, 170–171.
8. See Paul M. Collins Jr. and Lori Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* (New York: Cambridge University Press, 2013).
9. Adam Liptak, "A Simple Script: Saying Nothing, Over and Over," *New York Times*, September 9, 2018, 1.
10. Kevin Liptak, "How Kavanaugh Maneuvered to Win His Confirmation Fight," *CNN*, October 8, 2018.
11. Ian Millhiser, "Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society," *ThinkProgress*, June 15, 2016.

12. Joan Biskupic, *Sandra Day O'Connor* (New York: HarperCollins, 2005), 72–73. Burger's role in the Nixon nominations is discussed in John W. Dean, *The Rehnquist Choice* (New York: Free Press, 2001), 19, 52, 179–185.
13. Hemingway and Severino, *Justice on Trial*, 52; Christopher Cadelago, Nancy Cook, and Andrew Restuccia, "How a Private Meeting with Kennedy Helped Trump Get to 'Yes' on Kavanaugh," *Politico*, July 9, 2018.
14. This discussion is based in part on John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore, Md.: Johns Hopkins University Press, 1995); and Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships," in *Contemplating Courts*, ed. Lee Epstein (Washington, D.C.: CQ Press, 1995), 44–71.
15. Judicial Crisis Network, "Judicial Crisis Network Launches \$10 Million Campaign to Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee," January 9, 2017, <https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/>; Bill Allison and Greg Sullivan, "Kavanaugh Ads Flood the Airwaves," *Bloomberg News*, October 3, 2018.
16. Richard Davis, *Supreme Democracy: The End of Elitism in Supreme Court Nominations* (New York: Oxford University Press, 2017), 16.
17. The discussion of nomination decisions that follows draws much from Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush* (Charlottesville: University of Virginia Press, 2007); and David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Justices* (Chicago: University of Chicago Press, 1999).
18. Brian Lamb, Susan Swain, and Mark Farkas, eds., *The Supreme Court: A C-Span Book Featuring the Justices in Their Own Words* (New York: Public Affairs, 2010), 160.
19. Nemacheck, *Strategic Selection*, chap. 3; Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "Obama's Judiciary at Midterm: The Confirmation Drama Continues," *Judicature* 94 (May–June 2011): 277.
20. Hulse, *Confirmation Bias*, 2–3.
21. Hulse, *Confirmation Bias*, 163.
22. The nomination process for Gorsuch is described in Adam Liptak, "Gorsuch Clinched Spot After a Lengthy Process," *New York Times*, February 7, 2017, A15; Hulse, *Confirmation Bias*, 160–163; and Hemingway and Severino, *Justice on Trial*, 58–62.
23. The nomination process for Kavanaugh is discussed in Mark Landler and Maggie Haberman, "Former Bush Aide Is Trump Pick for Court," *New York Times*, July 10, 2018, A1; Ashley Parker and Robert Costa, "President Wavered Late on Nominee Decision," *Washington Post*, July 11, 2018, A1; Hemingway and Severino, *Justice on Trial*, 20–24; and Marcus, *Supreme Ambition*, 67–92.
24. Richard A. Posner, "The Supreme Court After the Nuclear Option," *Slate*, April 8, 2017.
25. Robert Barnes, "Clinton Papers Illuminate the Selection Process," *Washington Post*, June 9, 2014, A13.
26. Matt Grossmann and David A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats* (New York: Oxford University Press, 2016), 72.
27. "Justice Anthony Kennedy: Surely Reagan's Biggest Disappointment," *Human Events*, May 31–June 7, 1996, 3.
28. Robert Scigliano, *The Supreme Court and the Presidency* (New York: Free Press, 1971), 95.

29. William O. Douglas, *The Court Years 1939–1975: The Autobiography of William O. Douglas* (New York: Random House, 1980), 247; John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (New York: Little, Brown, 2011), 60–61.
30. John Fritze, “President Trump on Supreme Court Nominee Brett Kavanaugh: ‘I Don’t Even Know Him,’” *USA Today*, October 2, 2018.
31. These figures on nominations and confirmations and figures presented later in the chapter are based on Denis Steven Rutkus and Maureen Bearden, *Supreme Court Nominations, 1789 to the Present: Actions by the Senate, the Judiciary Committee, and the President*, Congressional Research Service, Report RL33225 (2012); and Henry B. Hogue, *Supreme Court Nominations Not Confirmed, 1789–August 2010*, Congressional Research Service, Report RL31171 (2010), updated with the Gorsuch and Kavanaugh nominations and confirmations. In several instances, it is uncertain whether a nomination should be counted as failing to win confirmation, so the figure of twenty-nine failures should be regarded as approximate.
32. Charles M. Cameron and Jonathan P. Kastellec, “Are Supreme Court Nominations a Move-the-Median Game?” *American Political Science Review* 110 (November 2016): 778–797.
33. These figures are based on data in Rutkus and Bearden, *Supreme Court Nominations*, 33–39.
34. In computing this success rate, all nominations made in the fourth calendar year of a president’s term or early in the fifth year before the term ended were counted as last-year nominations.
35. Laura Kalman, *The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court* (New York: Oxford University Press, 2017), 141.
36. “Here Comes the Judge,” *Newsweek*, February 2, 1970, 19.
37. Richard Reeves, *President Nixon: Alone in the White House* (New York: Simon & Schuster, 2001), 161.
38. Sonia Sotomayor, “A Latina Judge’s Voice,” *Berkeley La Raza Law Journal* 13 (Spring 2002): 92.
39. Jamie Stengle, “Ruth Bader Ginsburg Speaks at SMU,” *Deseret News* (Salt Lake City), August 29, 2011; Brent Martin, “Chief Justice Roberts: Scalia, Ginsburg Wouldn’t Be Confirmed Today,” *Nebraska Radio Network*, September 19, 2014.
40. See Scott Basinger and Maxwell Mak, “The Changing Politics of Supreme Court Confirmations,” *American Politics Research* 40 (July 2012): 737–763.
41. Davis, *Supreme Democracy*, 177.
42. Ed Enoch, “U.S. Supreme Court Justice Elena Kagan Speaks About Diversity,” *Tuscaloosa News*, October 4, 2013.
43. This discussion of justices’ backgrounds is based in part on John R. Schmidhauser, *Judges and Justices: The Federal Appellate Judiciary* (Boston, Mass.: Little, Brown, 1979), 41–100.
44. These proportions are based on biographies in the *Biographical Directory of Federal Judges*, compiled by the Federal Judicial Center, <https://www.fjc.gov/history/judges>.
45. Benjamin A. Barton, “An Empirical Study of Supreme Court Justice Pre-Appointment Experience,” *Florida Law Review* 64 (September 2012): 1148–1151.
46. Carl Hulse, “Is the Supreme Court Naïve About Corruption? Ask Jack Abramoff,” *New York Times*, July 6, 2016, A15. The decision was *McDonnell v. United States* (2016).
47. Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium*, 6th ed. (Washington, D.C.: CQ Press, 2015), Table 4-2.
48. Bradley Blackburn, “Justices Ruth Bader Ginsburg and Sandra Day O’Connor on Life and the Supreme Court,” *ABC News*, October 26, 2010.
49. Adam Liptak, “Two Justices Ponder a Cookie-Cutter Court,” *New York Times*, September 6, 2016, A13.

50. Bruce Vielmetti, "Visiting MU, Justice Kagan Tells of Hunting with Scalia," *Milwaukee Journal Sentinel*, April 3, 2012. See Patrick J. Glen, "Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan," *UCLA Law Review Discourse* 58 (2010): 129–154.
51. Colleen Walsh, "Associate Justice Elena Kagan Provides Peek into Supreme Court's Everyday Workings," *Harvard Gazette*, September 4, 2014, <http://news.harvard.edu/gazette/story/2014/09/court-sense>.
52. John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (New York: Little, Brown, 2019), 141.
53. Evan Thomas, *First: Sandra Day O'Connor* (New York: Random House, 2019), 257.
54. Stevens, *Making of a Justice*, 499, 503.
55. Thomas, *First*, 371–380. See Mary Harris and Dahlia Lithwick, "Why Ruth Bader Ginsburg Didn't Retire During Obama's Presidency," *Slate*, January 18, 2019.
56. Robert Barnes, "Souter Reportedly Planning to Retire from High Court," *Washington Post*, May 1, 2009, A1.
57. Christine Kexel Chabot, "Do Justices Time Their Retirements Politically? An Empirical Analysis of the Timing and Outcomes of Supreme Court Retirements in the Modern Era," *Utah Law Review* 2019 (2019): 527–580.
58. Nina Totenberg, "Justice Ginsburg: 'I Am Very Much Alive,'" *Morning Edition*, National Public Radio, July 24, 2019, <https://www.npr.org/templates/transcript/transcript.php?storyId=744633713>.
59. U.S. Constitution, art. 2, § 4.
60. John Ehrlichman, *Witness to Power: The Nixon Years* (New York: Simon & Schuster, 1982), 122.
61. Laura Kalman, *Abe Fortas: A Biography* (New Haven, Conn.: Yale University Press, 1990), 359–376; Bruce Allen Murphy, *Fortas: The Rise and Fall of a Supreme Court Justice* (New York: Morrow, 1988).
62. Dean, *Rehnquist Choice*, 11.
63. Dean, *Rehnquist Choice*, 26.
64. Information on participation in cases by Justices Souter and O'Connor was drawn from the LexisNexis archive of court of appeals decisions.
65. Natasha Singer, "Trailblazing Justice Now Has Games on Docket," *New York Times*, March 28, 2016, B1.